TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 76

FRANK E. FURST AND FRED G. THOMAS, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF FURST & THOMAS, APPELLANTS,

vs.

JAMES G. BREWSTER, ED A. DAVIS, AND HENRY M. BEATY

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED APRIL 10, 1930

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IN CIRCUIT COURT OF BRADLEY COUNTY

FRANK E. FURST & FRED G. THOMAS, Partners Doing Business under the Firm Name of Furst & Thomas, Plaintiffs,

vs.

JAS. G. BREWSTER, E. A. DAVIS & H. M. BEATY, Defendants.

COMPLAINT.

Frank E. Furst and Fred G. Thomas, the plaintiffs, are partners doing business under the firm name of Furst & Thomas.

In accordance with the terms of a written contract, a copy of which is hereto attached and made a part hereof, entered into on August tenth, nineteen twenty-one, by the plaintiffs with the defendant, James G. Brewster, the plaintiffs between that time and June third, nineteen twenty-four, sold, and delivered to James G. Brewster goods of the value of Two Thousand eighty one dollars and thirty-nine cents ($2081.39), as shown by the itemized account, hereto attached and made a part hereof.

James G. Brewster paid the plaintiffs upon said account the sum Twelve Hundred fifty-three dollars and sixty-seven cents ($1253.67) and returned goods of the value of Thirty-nine dollars and nineteen cents ($39.19), leaving due and unpaid the sum of seven hundred eighty-three dollars and fifty-three cents ($783.53).

In writing, a copy of which is hereto attached and made [fol. 3] a part hereof, the defendants E. A. Davis and H. M. Beaty, guaranteed payment of the sum due the plaintiffs from James G. Brewster, and neither has paid any part thereof.

Under the terms of the contract the amount stated became due on September third, nineteen twenty-four, and bore interest from that date at the rate of six per cent per annum.

Payment has been demanded from the defendants, and each of them, but has been refused.

Wherefore plaintiffs ask for judgment against the defendants in the sum of seven hundred and eighty-three dollars and fifty-three cents ($788.53) with interest at the rate of six per cent per annum from September third, nineteen twenty-four, together with all costs of this action.

Danaher & Danaher, Attorneys for Plaintiffs.

[fol. 4] EXHIBIT TO COMPLAINT

Contract.

This contract, made and entered into at Freeport, Illinois, this 10 day of August, 1921, by and between Frank E. Furst and Fred G. Thomas, co-partners, doing business under the name of Furst & Thomas, of Freeport, Illinois, and James G. Brewster of Warren, Ark., hereinafter called the Salesman, witness-th:

That upon acceptance of this contract, Furst & Thomas agree to hereafter, unless prevented by strikes, fires, accidents, or other causes beyond their control, sell and deliver to the said Salesman on board cars at Freeport, Illinois, or at their option at their nearest branch warehouse, at their current wholesale prices, their products in reasonable quantities as ordered by him, so long as this contract is in force and his account is in a satisfactory condition. Furst & Thomas also agree to give the salesman free advice and suggestions through bulletins, booklets and letters as to the best methods of selling to consumers the goods purchase- by him under this Contract, but it is expressly agreed that nothing contained in such advice and suggestions shall be binding upon the Salesman nor shall be construed as in any way altering or modifying the terms of this contract.

The Salesman agrees to pay Furst & Thomas the regular wholesale price of certain products designated by them any balance on his account for goods previously purchased by him and remaining unpaid at date of acceptance of this Contract in the folowing manner, to-wit: On the install-
[fol. 5] ment plan, by paying to said Furst & Thomas in cash each week, a sum equal to not less than one-half his total cash sales and collections from such goods during said week; provided that the Salesman may be required at

the option of Furst & Thomas to pay not less than the wholesale price of certain products designated by them and sold by him for cash or collected for during said week; provided, that by paying his account in full on or before the tenth day of each month, said Salesman shall receive a discount of 3% ; if he remits cash in full with each order, he shall receive a discount of 5% from their current wholesale prices.

As a matter of good faith and to show that the receipts of his business are from week to week, he agrees to send to Furst & Thomas each week a correct and fully itemized record of his business on forms provided for that purpose by them. Either party shall have a right to terminate this contract by giving written notice to the other party; provided, that if the sale or purchase of goods under this Contract be permanently discontinued for any reason it is thereby terminated and upon its termination from any cause by either party, the Salesman agrees to settle within three months the balance due said Furst & Thomas on account; provided, that the Salesman shall have the privilege of returning promptly after termination of Contract to Furst & Thomas, at Freeport, Illinois, by prepaid freight his stock of unsold goods, and for all goods so returned by the Salesman in original, unopened bottles and packages, Furst & Thomas agree to allow credit at the price origi-
[for. 6] nally charged after deducting the cost of checking, handling and putting such goods back into stock, and if on final accounting any balance is due the Salesman, to pay the same promptly.

This Contract is subject to acceptance by Furst & Thomas at their home office in Freeport, Illinois, and when so acc-pted shall immediately be in force and effect.

Accepted at Freeport, Illinois, Aug. 24, 1921.

Furst & Thomas. James G. Brewster, Salesman sign here in ink.

For and in consideration of the payment of $1.00 the receipt whereof is hereby acknowledged and the extension of credit to the above named salesman by Furst & Thomas, we, the undersigned, jointly and severally guarantee to them the faithful performance of the above Contract by

him and payment for goods furnished to him on credit, as therein provided, including any balance on his account for goods previously purchased by him and ramaining unpaid at date of its acceptance, waiving acceptance of this guaranty and all notice, and we agree that the written acknowledgment of his account by the said Salesman shall bind us, and that any extension of time shall not release us from liability hereon, and we further agree that after three months from the termination of the above agreement by either party and the non payment of his account by said Salesman, this guaranty shall become absolute as to the amount due from him and upon demand we promise to pay the amount due Furst & Thomas without any proceeding being taken by them against the said Salesman.

Guarantors sign here in ink.

[fols. 7–16]

Name	Occupation	Post Office Address
E. A. Davis	Farmer	Warren, Ark. Star Route
H. M. Beaty	Farming	Wilmar, Ark. R. #2

(Indorsed on back as follows:) Contract with Jas. G. Brewer. P. O. Address, Warren, Ark. Received —— —— ——. Accepted Aug. 24, 1921. Terminated 6-3-24.

[fol. 17] In Circuit Court of Bradley County

[Title omitted]

Answer and Cross Complaint of James G. Brewster—Filed Aug. 30, 1926

Comes the defendant, James G. Brewster, and for his separate answer to the complaint of the plaintiffs Frank E. Furst and Fred G. Thomas, states:

That defendant denies that the plaintiff sold and delivered to him under the contract mentioned in the complaint, merchandise in the sum of $2081.39, as shown by the itemized account attached to the complaint and made a part thereof. He admits that he paid the sum of $1253.67 and

returned goods in the value of $38.19, but denies that there is due and unpaid the sum of $788.53. He denies that said amount or any other sum became due on September 3, 1924, and bore interest from that date at the rate of 6% per annum. He denies any liability whatsoever as to the plaintiffs.

The defendant answering further and without waiving any of the foregoing denials alleges the truth to be that the plaintiff breached the said contract in that they terminated same without giving defendant proper notice of their intention to terminate said contract and that they failed and refused to furnish defendant with merchandise according to the terms of said contract. That they arbitrarily and without regard for his rights breached and terminated the [fols. 18-20] aforesaid contract and that at the time of their failure and refusal to furnish him with merchandise and breached their contract, that the defendant had placed at the suggestion of the plaintiffs, $700.00 in merchandise on credit amount the individual customers, and that due to the fact that plaintiffs refused to supply him with merchandise according to the terms of this contract that he was without merchandise to sell and could not collect from the customers who owed him. That if the plaintiff had supplied him with merchandise according to the terms of the contract he could have collected the outstanding debts and that of the said $700.00 the defendant could have received $350.00 net; that the plaintiffs have, by their to furnish merchandise as aforesaid, breached their contract and damaged plaintiff in the sum of $350.00.

Whereof, premises considered, defendant prays that plaintiff take nothing by reason of this action, and that he had all his costs expended and that upon cross-complaint he have judgment against plaintiff in the sum of $350.00, and for all other relief to which he is justly entitled, he will ever pray.

Clary & Ball, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 21] IN CIRCUIT COURT OF BRADLEY COUNTY

[Title omitted]

SEPARATE ANSWER AT LAW—Filed Aug. 30, 1926

Comes the defendants, E. A. Davis, & H. M. Beaty, and for their separate answer to the complaint of the plaintiffs, Frank E Furst & Fred G. Thomas, state:

The defendants not being advised and in order to place the plaintiffs upon proof, denies that in accordance with the terms of their written contract entered into on August 10, 1921, by the plaintiffs with the defendant, James G. Brewster, between that time and June 3, 1924, sold and delivered to James G. Brewster goods of the value of $2081.39, as shown by itemized account attached to the complaint.

Defendants admit that defendant, James G. Brewster, paid all upon said account except $788.53, but deny that that sum is now due or owing.

Defendants deny that they guaranteed the payment of this sum by James G. Brewster and deny that any amount is owing plaintiff at this time.

Defendants, further answering and without waiving any rights under the above denial state the truth to be that if any contract was entered into between plaintiff and James G. Brewster, on the date above stated and if plaintiff did sell to James G. Brewster any merchandise and if there is [fol. 22] any amount now due plaintiff on said account that defendants herein are not liable for the same.

Defendants would further show to the court that within thirty days prior to the termination of the contract above referred to that plaintiff advised defendants herein that the defendant James G. Brewster's account was in excellent shape and that the said James G. Brewster, was paying cash for all merchandise bought and that at that time the defendant, James G. Brewster, was solvent and had it not been for the misleading information given by plaintiff, defendants could and would have exercised their rights under the law for protection, and could have protected themselves at that time but that a short time after the termination of the said contract defendant, Brewster, through a series of

misfortunes became insolvent and is now insolvent and defendants are without any means of protection by means of contribution or otherwise, and that for the above cause plaintiffs have estopped themselves to demand payment of these defendants, and that they should be discharged.

Wherefore, premises considered, defendants E. A. Davis and H. M. Beaty pray that the plaintiff take nothing as against them and that they be discharged with all their costs herein expended.

Clary & Ball, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 23] In Circuit Court of Bradley County

[Title omitted]

Amended Separate Answer of James G. Brewster—Filed June 18, 1927

Comes the defendant, James G. Brewster, and files this his amended separate answer to the complaint of the plaintiff, Furst & Thomas, and for answer states:

Defendant admits that he signed and entered into the said contract on August 10, 1921, but denies that between that time and June 3, 1924, that said plaintiff sold and delivered to him goods of the value of $2081.39 as shown by itemized statement attached to the complaint and denies that any relationship of vendor and vendee existed between he and the plaintiffs.

He admits he paid plainitff the sum of $1253.67 and returned goods to the value of $39.19 but denies that he now owes them $788.53.

Defendant, answering further, alleges the truth to be that the aforesaid contract entered into between he and the plaintiff was a contract of agency and alleges that said company plaintiff was to furnish him with said goods in reasonable quantities to be by him sold for them and at their instance, and that for his services he was to receive [fol. 24] a certain percentage of the receipts from said sale. He denies that any goods were purchased by him at all

from said plaintiffs, but that said goods were consigned to him to be sold and that according to the terms of said contract all goods unsold at the termination of said contract was the property of the plaintiffs and was to be returned to them.

Defendant alleges that all goods delivered to him by the plaintiff were manufactured by Furst-McNess Company and that Furst & Thomas in delivering said goods to defendant were acting merely as agents for and in behalf of said Furst-McNess Company. That all deliveries so made by said Furst & Thomas were in truth and in fact made by Furst-McNess Company.

That Furst-McNess Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in Freeport, Illinois.

That said Furst-McNess Company has failed to file with the Secretary of State for the State of Arkansas a copy of its charter and has failed to file a statement of its assets and liabilities and has failed to designate its general offices in the State of Arkansas, as required by paragraph 1826 Crawford & Moses' Digest. That said Furst-McNess Company has failed to file the resolution of its Board of Directors and has failed to designate an agent for services in this State as required by law.

That said Furst-McNess Company has wholly failed to comply with the laws of the State of Arkansas pertaining to foreign corporations doing business in Arkansas and [fol. 25] and was not and is not authorized to maintain this action.

That Frank E. Hurst, one of the plaintiffs herein, was at all times herein mentioned and is now the President of Furst-McNess Company, and a large stockholder therein. That Fred G. Thomas, one of the plaintiffs herein, was at all times herein mentioned and is now a stockholder and Vice President of Furst-McNess Company.

That the firm of Furst & Thomas was organized at the same time Furst-McNess Company was founded and was organized for the sole purpose of distributing the products manufactured by Furst-McNess Company, and in making the contract with this defendant and in delivering the goods to this defendant acted for and on behalf of said Furst-

McNess Company and the contract when made was in truth and in fact a contract between this defendant and the said Furst-McNess Company, and that this defendant in handling and selling the products delivered by Furst & Thomas was acting as the agent in fact of the said Furst-McNess Company. That all the sales of the goods so delivered to him as aforesaid were had and made by this defendant in the State of Arkansas as the agent of Furst-McNess Company in the State of Arkansas, in violation of the statutes for such cases made and provided.

Defendant denies that he is indebted to the plaintiff in the sum of $788.53 or in any other sum or amount and having fully answered he asks that the complaint as to him be dismissed and that he have judgment for his costs.

[fol. 26] James G. Brewster, by Clary & Ball, His Attorneys.

[File endorsement omitted.]

[fol. 27] In Circuit Court of Bradley County

[Title omitted]

Amended and Substituted Separate Answer at Law of E. A. Davis and H. M. Beaty—Filed Dec. 1, 1927

Comes the defendants, E. A. Davis and H. M. Beaty, and files this their amended and substituted separate answer to the complaint of the plaintiff, Furst & Thomas, and states:

That as to whether or not the plaintiff is a co-partnership the defendants are unadvised and to place the same in issue deny the same.

Defendants admit that the contract mentioned and described in the plaintiff's complaint was executed as alleged, but as to whether or not said contract was accepted by the plaintiffs these defendants have neither knowledge or information thereof sufficient to form a belief.

Defendants deny that any products were sold by the plaintiffs to their co-defendant, James G. Brewster, and deny that any products were purchased by their co-defendant, the said James G. Brewster from the plaintiffs.

As to whether or not the plaintiffs made any delivery of products to their co-defendant, James G. Brewster, these [fol. 28] defendants have neither knowledge nor information thereof sufficient to form a belief.

As to whether or not their co-defendant, James G. Brewster, made remittances to the plaintiff, these defendants have neither knowledge nor information thereof sufficient to for a belief. As to whether or not three months have elapsed since said contract was terminated, if it was terminated, these defendants are not advised and have neither information or knowledge thereof sufficient to form a belief.

Defendants deny that any balance due from their co-defendant to said plaintiffs is $788.53, or any other sum or amount, and deny that their co-defendant, James G. Brewster, is indebted to the plaintiffs in the said sum or in any other sum or amount.

As to whether or not goods, wares and merchandise were delivered to their co-defendant, James G. Brewster, in the amount as represented by each item set forth in the statement of account filed with plaintiff's complaint, these defendants have neither knowledge nor information sufficient to form a belief.

As to whether or not their co-defendant, James G. Brewster, is indebted to plaintiff for each and every one of the items of debt as set forth in said statement of account, these defendants have neither knowledge nor information thereof sufficient to form a belief.

Further answering, these defendants deny that any of the goods delivered to their co-defendant, Brewster, were [fol. 29] purchased by said defendant, Brewster, but states that all the goods so delivered to their co-defendant, Brewster, were consigned to him to be sold and that all goods so delivered to him remaining unsold at the termination of the contract were to be by him returned to the plaintiffs.

That all goods delivered to their co-defendant, Brewster, by the plaintiffs were manufactured by and were the property of Furst-McNess Company. That Furst & Thomas in delivering said goods to their co-defendant were acting merely as agents for and on behalf of said Furst-McNess Company, and that all deliveries so made by Furst & Thomas to their co-defendant, Brewster, were in truth and in fact made by Furst-McNess Company.

That Furst-McNess Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in Freeport, Illinois.

That said Furst-McNess Company has failed to file with the Secretary of State for the State of Arkansas a copy of its charter and has failed to file a statement of its assets and liabilities and has failed to designate its general office in the State of Arkansas, as required by Section 1826 of Crawford & Moses' Digest. That said Furst-McNess have wholly failed to comply with the laws of the State of Arkansas, permitting foreign corporations to do business in the State of Arkansas, and was not and is nof authorized to do business in said State of Arkansas.

[fol 30] That the said corporation of Furst-McNess Company and the said partnership of Furst & Thomas, plaintiffs, herein, was and are one and the same company. That said Furst & Thomas are merely one branch of the Furst-McNess Company, organized for the sole purpose of distributing the products manufactured by Furst-McNess Company.

That Furst & Thomas were and are the agents of Furst-McNess Company in making the contract with defendant, Brewster, and in delivering goods to said Brewster they acted for and on behalf of the said Furst-McNess Company and the contract when made was in truth and in fact a contract between their co-defendant, Brewster, and Furst-McNess Company, and co-defendant, Brewster, in handling and selling of the products delivered to him by Furst & Thomas was acting as the agent of said Furst-McNess Company. That Furst-McNess Company and F. W. McNess are one and the same.

That all sales of goods so delivered to their co-defendant, Brewster, as aforesaid, were had and made by him in the State of Arkansas, as the agent of Furst-McNess Company. So that these defendants say that the selling by their co-defendant, Brewster, of said goods in the State of Arkansas constituted the doing of business by Furst-McNess Company in the State of Arkansas and the violation of the statutes in such cases made and provided, and that Furst-McNess Company or Furst & Thomas are without right to pursue any action against these defendants by

[fol. 31] reason of the aforesaid contract or any act thereunder.

Wherefore, these defendants pray that the complaint be dismissed and that they have judgment for all their costs herein expened and such other relief as is afforded them by law and ths statutes in such cases made and provided.

Clary & Ball, Solicitors for Defendants, E. A. Davis & H. M. Beaty.

[File endorsement omitted.]

[fol. 32] In Circuit Court of Bradley County

[Title omitted]

Amended Separate Answer of E. A. Davis and H. M. Beaty —Filed June 20, 1928

Comes the defendants, E. A. Davis and H. M. Beaty, and files this their separate answer, state:

Defendants not being advised and in order to place the matter in issue, deny that Furst & Thomas are a co-partnership. Defendants admit that the contract mentioned and described in plaintiffs' complaint was executed as alleged, but as to whether or not said contract was accepted by the plaintiffs, these defendants have neither knowledge or information thereof sufficient to form a belief.

The defendants deny that any products, commodities, goods, wares or merchandise were sold by the plaintiffs to their co-defendant, James G. Brewster, and deny that any products or goods were purchased by the said James G. Brewster from plaintiffs.

Defendants are not advised and have no information upon which to base a belief as to whether or not plaintiffs made any delivery of their products to their co-defendant, James G. Brewster, or whether or not the said James G. Brewster made remittance or plaintiff or returned goods.

[fol. 33] Defendants are not advised as to whether the contract mentioned between plaintiff and their co-defendant, James G. Brewster, has been terminated or not.

Defendants deny that there is any balance due from their co-defendant, James G. Brewster, to the plaintiff in the

sum of $788.53, or in any other amount. They deny that they are indebted to the plaintiff in the sum of $788.53, or in any other amount.

Defendants deny that they, or their co-defendant, are indebted unto the plaintiffs for products, goods, wares and merchandise in any sum whatsoever.

Defendants, further answering, deny that any of the goods delivered to their co-defendant, Brewster, were purchased by said defenant, Brewster, but state that all goods so delivered to their co-defendant, Brewster, were consigned to him under an agency contract to be sold, and that all goods so delivered to him remaining unsold at the termination of the contract were to be by him returned to plaintiffs.

That all goods delivered to their co-defendant, Brewster, by the plaintiffs were manufactured and were the property of Furst-McNess Company. That Furst & Thomas, in delivering said goods to their co-defendant, were acting merely as agents for and on behalf of Furst-McNess Company. And that all deliveries so made by Furst & Thomas to their codefendant, Brewster, werei n truth and in fact made by First-McNess Company for the purpose that their co-defendant might consummate sale thereof in the State [fol. 34] of Arkansas.

That Fuest-McNess Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in Freeport, Illinois.

That said Furst-McNess Company has failed to file with the Secretary of State of the State of Arkansas a copy of its charter and has failed to file a statement of its assets and liabilities and failed to designate its general offices in the State of Arkansas, as is required by law.

That said Furst-McNess Company has failed to file the Resolution of its Board of Directors and has failed to designate an agent of service in this State, as required by law.

That said Furst-McNess Company has wholly failed to comply with the laws of the State of Arkansas authorizing and directing foreign corporations to domesticate themselves before doing business in Arkansas and was and is not authorized to do busines in Arkansas.

That Frank E. Furst, one of the plaintiffs herein, was at all times hereinafter mentioned and is now the President of Furst-McNess Company and a large stockholder therein. And that Fr-d G. Thomas, one of the plaintiffs herein, was at all times herein mentioned and now is Vice President of Furst-McNess Company and a large stockholder therein. That the control of the Furst-McNess Company is in the hands of Furst & Thomas. That the control of the business of Furst & Thomas is in the plaintiffs' hands.

That the firm of Furst & Thomas was organized at the [fol. 35] same time Furst-McNess Company was founded and was organized as an auxiliary to the Furst-McNess Company, or a distributing agency and for the sole purpose of distributing the products manufactured by Furst-McNess Company of distribution.

That Furst & Thomas were at all times herein mentioned and now are the agent of Furst-McNess Company and in making the contract with their co-defendant, Brewster, and delivering the goods to their co-defendant, Brewster, they acted for and on behalf of said Furst-McNess Company and the contract when made was in truth and in fact a contract between their co-defendant, Brewster, and Furst-McNess Company and that their co-defendant, Brewster, in handling and distributing the products delivered to him by Furst & Thomas was acting as the agent of said Furst-McNess Company.

That all the sales of goods so delivered to their co-defendant, Brewster, as aforesaid, were had and made by him in the State of Arkansas as the agent of Furst-McNess Company and these defendants say that the selling by Brewster of said goods and products in the State of Arkansas constituted the doing of business by Furst-McNess Company in the State of Arkansas in violation of the statutes in such cases made and provided. That the said Furst-McNess Company and the said Furst & Thomas were on all dates herein mentioned and now are one and the same organization, and that Furst & Thomas are merely a trade name under which Furst-McNess Company distributes their products.

Wherefore, defendants having fully answered, they pray [fol. 36] that the complaint herein be dismissed and that

they have judgment for all their costs herein expended and for such further and general relief as may be afforded them at law and under the statutes in such cases made and provided.

E. A. Davis and H. M. Beaty, by Clary & Ball, their Attorneys.

[File endorsement omitted.]

[fol. 37] In Circuit Court of Bradley County

Interrogatories to be Propounded to the Honorable Jim B. Higgins, Secretary of State of the State of Arkansas—Filed July 8, 1927

No. 1. Please State you- name and place of residence.

Ans. Jim B. Higgins, Litle Rock, Ark.

No. 2. State what official position, if any, you now hold.

Secretary of Stafe of the State of Arkansas.

No. 3. If you answer that you are the duly elected, qualified and acting Secretary of the State of Arkansas, state whether or not you are the proper custodian of incoeporation matters pertaining to domestic and foreign corporations, and the papers pertaining particularly to the qualifying of foreign corporations to do business in the State of Arkansas as required by paragraph 1826 of Crawford & Moses' Digest, Statutes of Arkansas.

Ans. I am.

No. 4. If you answer you are the proper custodian of said records, state whether or not your records show that Furst-McNess Company, or Furst & Thomas, have qualified under the aforementioned statutes of Arkansas pertaining to foreign corporations doing business in the State of Arkansas.

Ans. I find no record of said corporation ever having [fol. 38] been authorized to do business in Arkansas.

No. 5. State whether or not the said Furst-McNess Company or Furst & Thomas according to your records are qualified as a foreign or domestic corporation to do business in the State of Arkansas.

Ans. I find no record of a corporation by the name of Furst-McNess or Furst & Thomas ever having been authorized to operate in Arkansas either as a domestic or foreign corporation.

No. 6. If your answer that said corporations or either of them are so qualified, please attach hereto as exhibit to your testimony a certified copy of their qualifications as reflected by your records of your office and initial same as a means of identification, making each paper Exhibit A, B, C, etc.

Ans. I have answered no.

No. 7. State any other facts within your knowledge pertaining to said records which could reflect either way upon said corporation, qualifications, qualifications, if any.

Ans. None.

End of direct interrogatories.

[fols. 39-43] Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fols. 44 & 45] In Circuit Court of Bradley County

#870

Furst & Thomas

vs.

Jas. G. Brewster, E. A. Davis, and H. M. Beaty

Verdict and Judgment—Jan. 10, 1929

Now comes the jury empanelled in this cause on yesterday and take their places in the jury box after being instructed by the court they retire to a jury room to consider of their verdict and after a time return into court the following verdict, to-wit:

"We, the jury, find for the defendant, L. H. Dearmond, Foreman."

It is therefore by the court considered, ordered and adjudged that the plaintiffs Furst & Thomas, take nothing from this suit and that this cause be dismissed from the docket of this court.

It is further ordered and adjudged by the court that judgment be entered against plaintiffs and their bondsmen for all costs expended in this suit for which execution may issue.

[fols. 46 & 47] In Circuit Court of Bradley County

[Title omitted]

Bill of Exceptions—Filed April 25, 1929

The plaintiff to sustain the issues on its parts introduced the following witnesses, to-wit:

[fol. 48] Frank E. Furst, a witness produced, sworn and examined deposes and says as follows:

Q. What is your name, age, residence and occupation?

A. Frank E. Furst, age 53, Freeport, Illinois; one of the partners in the firm of Furst & Thomas.

Q. Who are the members of this firm?

A. This co-partnership is composed of Frank E. Furst and myself.

Q. When was this firm organized?

A. Furst & Thomas was organized in 1908.

Q. Has this firm been doing business continuously ever since that time?

A. Yes, sir; it has.

Q. Where is the principal office and place of business of Furst & Thomas?

A. The principal office and place of business of Furst & Thomas is now and always has been since our organization at Freeport, Illinois.

Q. Did Furst & Thomas have any business dealings with one James G. Brewster?

A. Yes, sir; we did.

Q. How did these business dealings arise?

A. James G. Brewster entered into a written contract with Furst & Thomas for the purchase of him of goods sold by Furst & Thomas at wholesale.

[fol. 49] Q. Can you produce this contract?

A. Yes, sir; I have it here.

Q. Will you please mark this contract Exhibit "A" over your signature?

A. I am doing so.

Q. How and where was Exhibit "A" received by Furst & Thomas?

A. Exhibit "A" was received by Furst & Thomas through the Post Office at Freeport, Illinois, by United States Mail at the office of Furst & Thomas, Freeport, Illinois.

Q. When was this contract received by you?

A. On or about August 10th, 1921.

Q. What, if anything, was done with reference to this contract?

A. I accepted this contract at Freeport, Illinois on behalf of Furst & Thomas by writing the words "Furst & Thomas" under the words, "Accepted at Freeport, Illinois, Aug. 24, 1921" and I notified James G. Brewster to that effect by sending him a written notice through the U. S. Mail and I also sent him an exact copy of this contract at the same time.

Q. Can you produce this notice or a copy of same?

A. The original was mailed as stated before but I have here a duplicate original which is an exact duplicate.

Q. How was this duplicate prepared?

[fol. 50] A. It was prepared by the insertion of a carbon sheet between the original and this duplicate so that both were made at the same time by the same operations of the typewriter and so that this is an exact duplicate.

Q. Please mark this Exhibit "B" over your signature?

A. I am doing so.

Q. What, if anything, else did you do with reference to sending out notices?

A. On the same day, that is August 24, 1921, I wrote E. A. Davis, Star Route, Warren, Arkansas, and H. M. Beaty, Wilmar, Arkansas, R. #2, a notice that the con-

tract Exhibit "A" had been accepted by sending them such notice through the U. S. Mail by depositing same in the Post Office at Freeport, Illinois, postage prepaid, addressed as stated before.

Q. Were all dealings which Furst & Thomas had with James G. Brewster transacted under and by virtue of Exhibit "A"?

A. Yes, sir; we had no other contract with him and no business dealings with him except under this contract.

Q. When the contract, Exhibit "A," was received by Furst & Thomas, whose names appeared on the same?

A. The name of James G. Brewster and at the bottom of the page the names E. A. Davis and H. M. Beaty, exactly as they now appear.

[fol. 51] Q. Is the contract, Exhibit "A," as to all printed matter now in the same condition as when received by Furst & Thomas?

A. It is.

Q. As to the fact of the contract, is Exhibit "A" in all respects in the same condition as when received by Furst & Thomas from James G. Brewster?

A. It is except for the addition of the signature of Furst & Thomas, and "Aug. 24, 1921" which was inserted after we received the same.

Q. Did James G. Brewster order any goods from Furst & Thomas under this contract?

A. Yes, sir, he did.

Q. Who handled the business transaction of *t*our firm with James G. Brewster other than those handled by yourself?

A. Mr. James A. Scott, our sales manager handled these matters on behalf of Furst & Thomas and with the author- of Furst & Thomas.

Q. Did James G. Brewster have a book account with Furst & Thomas for goods which he purchased from them?

A. He did.

Q. Has this account been paid in full to Furst & Thomas?

A. No, sir; it has not.

Q. Do you know of your own knowledge what the balance is which is due and owing on the account of James G. Brewster with Furst & Thomas?

A. I do.

[fols. 52-60] Q. What is the balance due?

A. $788.53 with interest from September 3, 1924.

Q. Has any part of this balance been paid by E. A. Davis or H. M. Beaty?

A. No part of this balance has been paid by any one.

Q. Who kept the book account of Furst & Thomas with James G. Brewster?

A. Carrie Maurer and Ruth Frank kept this account.

Q. Please attach exhibits "A" and "B" to your deposition and make the same a part thereof.

A. I am doing so.

(Signed) Frank E. Furst.

Subscribed and sworn to before me this 10th day of July, A. D. 1925.

Harry E. Wheat, Notary Public & Commissioner.
(Seal.)

[fol. 61] JAMES A. SCOTT, a witness, produced and sworn and examined, deposes and says, as follows:

Q. What is your name, age, residence and occupation?

A. James A. Scott, age 36, Freeport, Illinois; Sales Manager for the firm of Furst & Thomas.

Q. How long have you been employed by this firm?

A. Since 1920.

Q. What have your duties been with this firm?

A. I have handled the correspondence on sales, and other business transactions between the firm and the purchasers of goods from Furst & Thomas.

Q. Do you know whether or not this firm had any business dealings with one James G. Brewster?

A. Yes, sir; I know that Furst & Thomas had a written contract with him and that he purchased from them a considerable amount of goods by virtue of the contract.

Q. Did you handle the correspondence and receive the orders for goods sold to Mr. Brewster and receive any remittances made by him on his account?

A. Yes, I handled practically all the business transactions between Furst & Thomas and James G. Brewster after the acceptance of his contract.

Q. Is the contract Exhibit "A", as identified by Mr. Thomas, the one under which Mr. Brewster purchased goods from Furst & Thomas

[fol. 62] A. It is.

Q. How did Mr. Brewster indicate his desire to purchase goods from Furst & Thomas under this contract?

A. He sent in signed orders for the goods which he desired, on forms provided for that purpose.

Q. Can you produce the orders sent in by Mr. Brewster?

A. Yes, I have them here.

Q. Will you please mark these Exhibits "1" to "42" inclusive over your signature?

A. I am doing so.

Q. How were the orders which you have marked as Exhibits sent to you?

A. These Exhibits came to Furst & Thomas through the U. S. Mail and were received by us from the Post Office at Freeport, Illinois.

Q. Please state whether or not the goods noted on these orders were shipped to James G. Brewster by Furst & Thomas?

A. All goods noted in the "Amount shipped" column as indicated on the orders were shipped to Mr. Brewster and the total amount of each order charged to his account.

Q. At the time each shipment was made on these orders for goods which you have already identified, please state whether or not you gave James G. Brewster any notice as to the shipment?

A. At the time each shipment was made an invoice was [fol. 63] mailed to James G. Brewster at the address given on the respective orders showing the amount of goods shipped and wholesale price of same which was charged to his account together with the total charge for the shipment.

Q. Can you produce these invoices?

A. No, I cannot, as these were mailed to Mr. Brewster, but I have here a duplicate original of each one.

Q. How were these duplicate originals prepared?

A. By the insertion of a carbon sheet between two invoice forms one of which was sent to Mr. Brewster and one kept for our files, which I have here; the original and duplicate of each were prepared at the same time by the same

operations of the typewriter so that these are exact duplicates of the originals sent Mr. Brewster.

Q. Will you please mark these duplicate original invoices as Exhibits "43" to "84" over your signature for the purpose of identification?

A. I am doing so.

Q. Were he goods noted in these invoices shipped to James G. Brewster by Furst & Thomas and were they shipped and charged to his account under the contract, Ex- "A"?

A. Yes, these goods were all shipped to Mr. Brewster and were shipped and charged to his account under the [fol. 64] contract Exhibit "A".

Q. How were they shipped?

A. By freight, express or parcel post.

Q. When shipment of these goods was made to James G. Brewster did you receive bills of lading, express receipt or receipts from the transportation company for the same?

A. As to the parcel post shipment we did not receive any receipt or bill of lading, but we did receive one original and one duplicate for each bill of lading or express receipt for shipments made by express or freight.

Q. What was done with the original and copy of each?

A. The originals were all sent to Mr. Brewster at the address noted on the respective orders and the duplicates or copies were retained by Furst & Thomas for our files.

Q. Can you produce these copies?

A. I have them here.

Q. Will you please mark them as Exhibits "85" to "119" over your signature for the purpose of identification?

A. I am doing so.

Q. Is James G. Brewster still purchasing goods from Furst & Thomas under Exhibit "A"?

A. No, Furst & Thomas terminated this contract June 3, 1924.

Q. Was any one notified of this action?

[fol. 65] A. Yes, on that date, June 3, 1924, I wrote James G. Brewster, H. M. Beaty and E. A. Davis to that effect.

Q. Can you produce these letters or copies of the same?

A. The originals were sent by U. S. Mail but I have here duplicate originals made at the same time.

Q. How were these duplicates prepared?

A. A carbon sheet was inserted between each original and each duplicate so that both were prepared at the same time by the typewriter and so that both were exactly the same.

Q. Please mark these duplicates Exhibits "C", "D" and "E" over your signature.

A. I am doing so.

Q. At the date of termination of the contract, Exhibit "A" do you know whether or not Jsmes G. Brewster owed Furst & Thomas any balance on his account with them?

A. I know that he did.

Q. Did you make written demands upon James G. Brewster, E. A. Davis and H. M. Beaty for payment of this account?

A. Yes, I made numerous written demands for payment.

Q. Can you produce these written demands or duplicates of the same?

A. I cannot produce the original notices as these were sent by U. S. Mail to the several parties, but I have here duplicates of these demands made at the same time.

[fol. 66] Q. How were these duplicates prepared?

A. They were prepared in the same manner as Exhibits "C", "D" and "E" already testified to.

Q. Please mark these as Exhibit "F", through the alphabet to Exhibit ")" inclusive over your signature.

A. I am doing so.

Q. Did Furst & Thomas after the termination of the contract receive any letters from James G. Brewster in regard to this account?

A. Yes, on October 1, 1924, we received a letter from him by United States Mail dated September 26, 1924, and on October 15, 1924, we received another letter from him by U. S. mail, dated October 10, 1924, both of which letters were received at Freeport, Illinois.

Q. Please mark these letters Exhibits "P" and "Q" over your signature?

A. I am doing so.

Q. Did Furst & Thomas receive any communication from E. A. Davis after the termination of this contract?

A. Yes, on June 26, 1924, we received a letter from E. A. Davis by U. S. Mail dated June 24, 1924, which letter was received by us from the Post Office, Freeport, Illinois.

Q. Please mark this letter Exhibit "R" over your signature?

A. I am doing so.

[fol. 67] Q. Did Furst & Thomas reply to that letter?

A. On behalf of Furst & Thomas I sent a written reply to Mr. Davis.

Q. Can you produce this written communication?

A. No, this was mailed by U. S. Mail.

Q. Can you produce a duplicate of this letter, and if so, how was this prepared?

A. I have a duplicate original of this letter which was prepared in the same manner as Exhibits "C", "D" and "E" already testified to.

Q. Please mark this Exhibit "S" over your signature.

A. I am doing so.

Q. Did James G. Brewster ever acknowledge to Furst & Thomas at any time that he was indebted to them for any amount?

A. He did.

Q. Please *a*tate how, when and under what circumstances?

A. On January 25, 1922, he acknowledged in writing over his signature that he was indebted to Furst & Thomas in the sum of $232.06 as of January 1, 1921; he also acknowledged himself to be indebted on July 9, 1922 in the sum of $476.95 as of July 1, 1922; also on February 19, 1923, in the sum of $614.34 as of January 1, 1923; also on August 7, 1923, in the sum of $776.54 as of July 1, 1923; and also on January 22, 1924 in the sum of $754.05 as of January 1, 1924.

[fol. 68] Q. Please mark these written acknowledgments Exhibits "T," "T1," "T2," "T3," and "T4" over your signature?

A. I am doing so.

Q. From who and how were these received?

A. These were received by Furst & Thomas from James G. Brewster by U. S. Mail from the Post Office at Freeport, Illinois.

Q. Did you send James G. Brewster a statement of his account from time to time?

A. Yes, we sent him a statement from time to time showing the balance which our books showed that he owed us and

requested him to check over his books and if he found our balance to be correct to return an acknowledgment of account to us.

Q. Did you receive Exhibits "T," "T1," "T2," "T3" and "T4" inclusive from James G. Brewster after sending him such a statement and making such requests?

A. We did.

Q. Has the account of James G. Brewster been fully paid?

A. No, it has not.

Q. Please state, if you know, what is the balance due Furst & Thomas on this account.

A. There is a balance of $788.53 with interest from September 3, 1924.

Q. Has this account been paid by anyone?

A. No, sir.

[fols. 69, 69a, 69b] Q. Who kept the book account of Furst & Thomas with James G. Brewster?

A. Carrie Maurer and Ruth Frank kept this account for Furst & Thomas.

Q. Please attach to your deposition and make as a part thereof Exhibits "1" to "119" inclusive and Exhibits "C" through the alphabet to "T" inclusive and Exhibits "T1," "T2," "T3" and "T4."

A. I am doing so.

(Signed) Jas. A. Scott.

Subscribed and sworn to before me this 21st day of July, A. D. 1925.

(Signed) Harry E. Wheat, Notary Public & Commissioner. (Seal.)

Stenographer's Note

At request of attorney representing the plaintiff the stenographer will only make one copy of exhibits ranging from "1" to "42," and one copy of Exhibits ranging from "43" to "84" and one copy of Exhibits ranging from "85" to "119." The Exhibits from "1" to "42" being practically the same with exceptions of amounts of goods ordered and the Exhibits from "43" to "84" being the same with the exception of the amount of goods shipped and from "85" to "119" being the same (all freight bill of ladings and express receipts). Therefore only one copy of each set of Exhibits will be made by the Stenographer.

Which Exhibits are in words and figures as follows, to-wit:

[fols. 70 to 83] EXHIBIT TO TESTIMONY OF JAMES A. SCOTT

For use in connection with —aight'' uniform Bill of Lading—Adopted by carriers in Official Classification and Western Classification territories, effective February 29, 1920.

This memorandum is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, but a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Received, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

From Furst & Thomas

At Memphis, Tenn., 9-26, 1921. Shipper's No. —

By I. M. Railroad Company. Agent's No. —.

Consigned to J. G. Brewster, same. Destination, Warren State of Ark., County of ——. Route ——. Car Initial ——. Car No. ——.

''The Condition of this Bill of Lading are amended by Supplement No. 11 to Consolidated Classification No. 1, effective December 10, 1920, or subsequent reissues thereof, as filed with the Interstate Commerce Commission and State Commissions, and to the extent to which they are inconsistent with such amendment they are superseded thereby.''

J— ——.

Exhibit Jas. A. Scott memorandum.

[fol. 84] EXHIBITS ''T,'' ''T1,'' ''T2,'' ''T3,'' ''T4'' TO TESTIMONY OF JAMES A. SCOTT

Date Jan. 1/1922.

Furst & Thomas, Freeport, Illinois.

GENTLEMEN: I have checked over my account with your statement showing that I own you a balance of $232.06 on

January 1, 1922, and approve the same as being correct on the date stated.

(Signed) Jas. G. Brewster. Sign your name here with pen and ink.

Date 7/29/1922.

Furst & Thomas, Freeport, Illinois.

GENTLEMEN: I have checked over my account with your your statement showing that I owe you a balance of $476.95 on July 1, 1922, and approve the same as being correct on the date stated.

(Signed) Jas. G. Brewster. Sign your name here with pen and ink.

Date 2/19/1923.

Furst & Thomas, Freeport, Illinois.

GENTLEMEN: I have checked over my account with your your statement showing that I owe you a balance of $614.34 on January 1, 1923, and approve the same as being correct on the date stated.

(Signed) Jas. G. Brewster. Sign your name here with pen and ink.

Aug. 7, 1923.

Furst & Thomas, Freeport, Illinois.

GENTLEMEN: I have checked over my account with your your statement showing that I owe you a balance of $776.54 on July 1, 1923, and approve the same as being correct on the date stated.

(Signed) Jas. G. Brewster. Sign your name here with pen and ink.

[fol. 85] 1/22/1924.

Furst & Thomas, Freeport, Illinois.

GENTLEMEN: I have checked over my account with *t*our statement showing that I owe you a balance of $754.05 on January 1, 1924, and approve the same as being correct on the date stated.

(Signed) Jas. G. Brewster. Sign your name here with pen and ink.

[fol. 86] CARRIE MAURER, a witness produced, sworn and examined testified as follows:

Q. What is your name, age, residence and occupation?

A. Carrier Maurer, over 21 years, Freeport, Illinois, bookkeeper for Furst & Thomas.

Q. How long have you been employed by Furst & Thomas and in what capacity

A. Since March 1, 1921, as a bookkeeper.

Q. Please state whether or not since that time you kept an account of one James G. Brewster with Furst & Thomas?

A. I kept that account from the time it was opened to May 1, 1923.

Q. Can you produce the book in which this account was kept?

A. Yes, I have it here.

Q. Is this a book of original entries?

A. It is.

Q. What kind of a book is this as to form?

A. A loose leaf book.

Q. If you can, please detach from this book the leaf or leaves showing the account of James G. Brewster with Furst & Thomas?

A. I can and am now doing so.

Q. Who made the entries on these pages?

A. I personally made the entries to May 1, 1923.

Q. Were these entries made in the regular course of business and in the regular course of your duties and as a part of your duties as bookkeeper?

[fol. 87] A. Yes, sir; they were.

Q. Are these original entries?

A. They are.

Q. Was this account correctly kept and were all entries correctly made?

A. This account was correctly kept and all entries were made correctly.

Q. When were these entries made?

A. Each of these entries were made at or about the time the transaction noted by it occurred.

Q. Was it a part of your regular and customary duties to make these entries?

A. It was.

Q. Did you ever keep any other account of Furst & Thomas with James G. Brewster or have any knowledge of any other account existing?

A. This account as kept by myself and later by Ruth Frank is the only account I ever kept or had knowledge of.

Q. Does this account show all charges and all credits correctly entered?

A. It does.

Q. Was there any balance due Furst & Thomas on August 24, 1921, on this account?

A. No, the first entry was made by me on Septmber 26, 1921.

Q. What was the balance due on this account on January 1, 1922, July 1, 1922 and January 1, 1923?

A. The balance on January 1, 1922 was $232.06; on July [fols. 88 & 88a] 1, 1922, was $476.95; and on January 1, 1923, was $614.34.

Q. What was the balance due on this account, if any, on May, 1923, when you discontinued keeping this account?

A. At that time there was a balance due of $740.34.

Q. Please attach Exhibits "U" and "V" to your deposition and make the same a part thereof?

A. I am doing so.

Q. As to Exhibit "V" were these entries made?

A. The entries I made on this Exhibit were made with a bookkeeping machine.

(Signed) Carrie Maurer

Subscribed and sworn to before me this 21st day of July, A. D. 1925.

Harry E. Wheat, Notary Public & Commissioner.
(Seal.)

[fol. 89] Ruth Frank, a witness being first duly sworn to testify the truth, the whole truth and nothing but the truth, testifies as follows:

Q. What is your name, age, residence and occupation?

A. Ruth Frank, age over 21, Freeport, Illinois; bookkeeper for Furst & Thomas.

Q. How long have you been employed by them?

A. Since May 1, 1923.

Q. Please state whether or not since that time you kept all or any part of an account of James G. Brewster with Furth & Thomas?

A. I kept this account from May 1, 1923, to date.

Q. Please examine Exhibits "U" and "V" and state whether or not these pages show the account during the time you kept the same?

A. Exhibit "V" shows this account during the time I kept it.

Q. Please identify Exhibit "V" with your signature and by reference make the same part of your deposition?

A. I am doing so.

Q. What was the balance due Furst & Thomas, if any, on May 1, 1923 on this account?

A. $740.34 was due on this account at that time.

Q. During the time you kept this account who made the entries on same?

A. I personally made these entries.

[fol. 90] Q. Were these entries made in the regular course of business?

A. They were.

Q. During this time was this account correctly kept and were all entries correctly made?

A. This account was correctly kept and all entries were correctly made.

Q. When were these entries made?

A. At or about the time the transaction noted by the entries occurred.

Q. Was it a part of your regular duties to make these entries?

A. It was.

Q. Does this account show all charges and all credits correctly entered?

A. It does.

Q. Has this account been fully paid?

A. No, sir; it has not.

Q. Please state, if you know, what is the balance due Furst & Thomas on this account?

A. There is a balance due Furst & Thomas on this account of $788.53.

Q. Has this been paid by any one?

A. No, sir; no one has paid all or any part of this balance.

Q. What was the balance due on this account, if any, on July 1, 1923, and on January 1, 1924?

A. On July 1, 1923, there was a balance due of $776.54; and on January 1, 1924, there was a balance due of $754.05.

[fols. 91-97] (Signed) Ruth Frank.

Subscribed and sworn to before me this 21st day of July, A. D. 1925.

(Signed) Harry E. Wheat, Notary Public & Commissioner (Seal.)

[fol. 98] Fran E. Furst, a witness being first duly sworn to testify to the truth, the whole truth and nothing but the truth, testified and deposed as follows, to-wit:

Q. Please state your name, age and residence?

A. Frank E. Furst, 54, Freeport, Illinois.

Q. In what business are you engaged in at the present time?

A. Selling proprietary remedies, flavoring extracts, toilet articles and other pharmaceutical goods, as a member of the firm of Furst & Thomas.

Q. How long have you been so engaged?

A. A little over twenty years.

Q. Do you know of an organization or corporaion known as Furst-McNess Company?

A. Yes, sir.

Q. Will you state where their principal place of business is located?

A. Freeport, Illinois.

Q. Where is Furst & Thomas' principal place of business located?

A. Freeport, Illinois.

Q. How long, Mr. Furst, have these two businesses been located in Freeport, Illinois?

A. For twenty years.

Q. Is Furst & Thomas a partnership or corporation?

A. Partnership.

Q. What official designation has Furst-McNess Company [fol. 99] with reference to being a partnership or corporation?

A. Corporation, incorporated under the laws of Illinois.

Q. Can you state what date it was incorporated?

By Mr. Hunter: Object to any question relating to Furst-McNess Company as being incompetent, irrelevant and immaterial.

A. I believe it was incorporated on February 7, 1908.

By Mr. Hunter: I move that the answer be stricken out for the reason stated in the objection.

Q. When was the partnership of Furst & Thomas organized?

A. It was organized about the same time, early in 1908.

Q. Have you any official connection with Furst & Thomas?

A. I am one of the partners. Fred G. Thomas is the other partner.

Q. Have you any official connection with Furst-McNess Company?

By Mr. Hunter: Same objection as to prior question relating to the Furst-McNess Company.

A. I am president of the Furst-McNess Company one of the directors.

By Mr. Hunter: I move that the answer be stricken for the same reason as presented in the prior objection.

Mr. Danaher: If the court please, I want to object to any and all parts of these several depositions which tend to or attempts to show the connection of Furst-McNess Company.

The Court: The court holds that the testimony is competent and permits it to be introduced to the jury over the objection of the plaintiff, to which ruling and action of the court the plaintiff objects, his objections being overruled, it at the time saved its separate and several exceptions.

Q. Were you a partner in Furst & Thomas partnership [fol. 100] during the years 1921, 1922 and 1923?

A. Yes sir.

Q. Your official connection with Furst-McNess about which you just testified, did it or did it not exist during the years 1921, 1922 and 1923?

By Mr. Hunter: Same objection on account of its incompetency, irrelevancy and immateriality.

A. I held the same offices with the Furst-McNess Company at that time.

By Mr. Hunter: I move that the answer be stricken for the same reason.

Q. Where is Furst-McNess Company's business located with reference to the City of Freeport, what part of the City?

By Mr. Hunter: Same objection.

A. On East Clark Street, No. 120 E. Clark Street.

By Mr. Hunter: Same motion.

Q. Can you state what use is made of that building?

By Mr. Hunter: Same objection.

A. It is used for manufacturing purposes and for offices.

By Mr. Hunter: Same motion.

Q. Will you state whether that would apply to the years 1921, 1922 and 1923?

By Mr. Hunter: Same objection.

A. Yes, it would.

By Mr. Hunter: Same motion.

Q. Mr. Furst, the questions I will ask you unless otherwise specified will be directed to the p-riod of time over 1921, 1922 and 1923. Where is Furst & Thomas' head-[fol. 101] quarters or business offices located?

A. They are located in the building at 120 E. Clark Street, Freeport, Illinois.

Q. Will you please state whether or not that is the same building occupied and used by the Furst-McNess Company?

By Mr. Hunter: Same objection.

A. Yes, it is the same building.

By Mr. Hunter: Same motion.

Q. Will you state who owns that building?

By Mr. Hunter: Same objection.

A. Furst-McNess Company owns the building.

By Mr. Hunter: Same motion.

Q. Will you state whether or not during that period of time Furst & Thomas occupied offices together with any other company or corporation during that time or any part of it?

By Mr. Hunter: Same objection.

A. They occupied offices with the Furst-McNess Company in the building referred to.

By Mr. Hunter: Same motion.

Q. I dont' believe I have asked you to outline the business Furst & Thomas was engaged in during those years, will you please do so?

A. They were engaged in selling proprietary remedies, flavoring extracts, spices, toilet articles and similar pharmaceutical products.

Q. Did they manufacture those articles or not?

A. They did not manufacture them.

[fol. 102] Q. Did they or did they not maintain a l-boratory and department for manufacturing?

A. They did not.

Q. Have they ever at any time owned or maintained any such quarters?

A. No, they have not.

Q. Have you authority in the management of Furst & Thomas' business?

A. I have equal authority with Mr. Thomas in the management of the business.

Q. Are you and Mr. Thomas the only partners or not?

A. We are all the partners.

Q. Will you state how the shares are divided or rate of interest in the business, is it equal or not?

A. It is practically equal, yes, sir, between Mr. Thomas and myself.

Q. I am correct when I saw and understand from you that you and Mr. Thomas have equal authority in the management and conduct of the Furst & Thomas business?

A. Possibly it would be more correct to say that either one of us has authority in the absence of the other. In respect to authority, I carry the title of senior partner and when I am present usually questions of policy are referred to me.

Q. How with reference to the Furst-McNess co*p*roration, I believe you stated you are president and you were president during the years I have just mentioned?

[fol. 103] Mr. Hunter: Same objection.

A. Yes, sir.

Mr. Hunter: Same motion .

Q. Will you give the names of the other officers of that corporation, please Mr. Furst?

Mr. Hunter: Same objection.

A. McNess is secretary, Mr. Thomas, Vice President.

Mr. Hunter: Same motion.

Q. Will you explain the authority or right of the officers which you just mentioned with reference to authority?

Mr. Hunter: Same objection.

A. They have the usual authority of the officers of a corporation. I could not recall the by-laws in detail and set out the authority of each, but *r*hey exercise the usual authority of the officers of a corporation.

By Mr. Hunter: Same motion.

Q. State what departments are maintained and operated by the Furst-McNess with referenne to the years referred to above?

By Mr. Hunter: Same objection.

A. I do not know that I can name all the various departments. They are the departments that have to do with the manufacture of pharmaceutical products of the Furst-McNess Company.

By Mr. Hunter: Same motion.

Q. I just mean the main departments.

By Mr. Hunter: Same objection.

A. They maintain an analytical and experimental department. They have a manufacturing department and a ship-
[fol. 104] ping department. I think those are the main departments.

By Mr. Hunter: Same motion.

Q. Have you or have you not a printing department?

By Mr. Hunter: Same objection.

A. Yes, there is a printing department.

By Mr. Hunter: Same motion.

Q. Will you state whether or not Furst & Thomas now or ever did own the printing plant or department?

A. No sir they do not.

Q. Did they or did they not send out literature or printed matter during the years of 1921, 1922 and 1923?

By Mr. Hunter: Who do you mean by they?

By Mr. Ball: Furst & Thomas.

A. They did.

Q. Will you state where this printing was done?

By Mr Hunter: Same objection.

A. It was done in the printing plant of Furst-McNess Company, that is, practically all of it, most of it was.

By Mr. Hunter: Same motion.

Q. Do you or do you not draw a salary from Furst & Thomas?

A. No, I would say not.

Q. Do you or do you not draw a salary from Furst-McNess Company?

Mr. Hunter: Same objection.

A. I do.

By Mr. Hunter: Same motion.

[fol. 105] Q. With whom is Mr. F. W. McNess connected, Furst-McNess Company or Furst-Thomas?

By Mr. Hunter: Same objection.

A. He is secretary of the Furst-McNess Company as I have stated.

By Mr. Hunter: Same motion.

Q. Does he have any official connection with Furst & Thomas?

A. He had no connection with Furst & Thomas.

Q. I don't recall whether I asked you or not, Mr. Furst, but I will ask you again, who is Treasurer of the Furst-McNess Company.

Mr. Hunter: Same objection.

A. I am.

Mr. Hunter. Same motion.

Q. Am I correct, Mr. Furst, when I state that I understood from you awhile ago that during the years mentioned above Furst-McNess Company and Furst & Thomas occupied the same office space in the same building?

By Mr. Hunter: Same objection and for the further reason that the prior answer would be the best record.

A. Yes, sir.

By Mr. Hunter: Same motion.

Q. Where does Furst-McNess Company store their goods and wares, in the building that you mentioned awhile ago?

By Mr. Hunter: Same objection.

A. Yes, sir.

By Mr. Hunter: Same motion.

[fol. 106] Q. Where does Furst & Thomas store their products or merchandise?

A. They have no separate storage space in Freeport.

Q. What do you mean by not having a separate storage space?

A. They do not purchase any of the products from Furst-McNess Company and store them, but turn over the orders for shipments to Furst-McNess Company, the goods they want shipped from Freeport.

Q. Then when they receive an order, by they, I mean Furst & Thomas, the order is turned over then to Furst-McNess shipping department and the goods are sent out, is that correct?

By Mr. Hunter: Same objection and for the further reason that there is no evidence in this case that there were any goods sent to the defendant from Freeport, Illinois.

A. Yes, sir.

By Mr. Hunter: Same motion.

Q. I believe you stated awhile ago that Furst-McNess Company own the building in which Furst & Thomas operate here in Freeport?

By Mr. Hunter: Same objection.

A. Here in Freeport, yes, sir.

By Mr. Hunter: Same motion.

Q. Do Furst & Thomas own the branch houses over the country or not?

A. They have branch houses at three points, Baltimore, Memphis and Oakland. They don't own the branch houses [fol. 107] at any of these places; they lease them at Baltimore and Oakland and at Memphis I personally own the property which they occupy.

Q. You say you personally owned them?

A. Yes, sir.

Q. Do Furst-McNess Company own any branch houses?

A. No, sir.

Q. Lease them?

A. No, sir.

Q. Their sole business is conducted here at Freeport?

A. Freeport, Illinois.

Q. Mr. Furst, state please how you divide your time between Furst & Thomas and the Furst-McNess business?

By Mr. Hunter: Same objection, it is incompetent, irrelevant and immaterial how he divides his time.

A. I cannot state any exact division of my time; I give whatever time is necessary to the duties of the offices I have with Furst-McNess Company, but most of my time is devoted to selling goods as a member of the partnership of Furst & Thomas.

By Mr. Hunter: Same motion.

Q. I believe you stated you were an executive in both companies or businesses?

By Mr. Hunter: Same objection.

A. An executive in Furst-McNess Company.

By Mr. Hunter: Same motion.

[fol. 108] Q. Mr. Furst, will you state please who has charge of the files of Furst & Thomas, who the proper custodian is, the files with reference to the business handled between Furst & Thomas and merchants, dealers or salesmen—whatever you term them?

A. Miss Florence Maurer is the Chief Filing Clerk, I think that is what you are inquiring about; she has several girls working under her in the filing department, but she is the head of the filing department.

Q. With reference to the business carried on by Furst & Thomas, will you state in a general way, please sir, how you conducted your business during the years 1921, 1922 and 1923 with reference to disposing of your products, how and by and through what channels, etc.

A. We sold our products through dealers in various states who purchased very largely on credit from us; we have some men who will buy for cash and others who buy for credit, the majority for credit; and sold our goods at retail to customers in the usual retail way. We sold some products through wholesale druggists and retail druggists but only a small per cent.

Q. During the years I have just mentioned do you recall having sold goods or dealt with a party in Bradley county,

Arkansas, by the name of James G. Brewster—I believe the county is Cleveland?

A. Well I remember we did have a dealer by that name. [fol. 109] I do not remember the details of our dealing with him.

Q. Do you remember whether or not you shipped merchandise or products to this man?

A. Well, I cannot say of my own personal knowledge or recollection at this time that we did but I believe he was one of our regular dealers at that time and as such we undoubtedly dis ship him goods.

Q. If you shipped him goods, do you recall from where they were shipped?

A. Well I could only state upon the general deduction that goods shipped to that point in Arkansas would be shipped from our branch warehouse in Memphis, Tennessee.

Q. Where were orders for goods approved and by whom?

A. The orders of men in good standing were approved by Mr. Hess, manager of our Memphis warehouse.

Q. Those not in good standing, where were they approved?

A. They were forwarded to Freeport, Illinois, for approval before the order *will* filled.

Q. Who passed on the order when it reached Freeport?

A. I could not say, during those years, who was handling that particular district. We had several sales managers in charge of different districts and during the years you have mentioned I am not positive as to who was handling Arkansas.

Q. By referring to your files can you refresh your memory on that question?

[fol. 110] Yes, sir: James A. Scott was in charge of that district at that time and approved the orders of the dealers from that locality.

Q. You have before you your files?

A. Well, I have a part of th*d* files here.

Q. Can you determine from that file whether or not goods were shipped by your partnership to James G. Brewster at Wilmar, Arkansas?

A. Yes, sir; this file shows that we did ship goods to J. G. Brewster, at Wilmar, Arkansas.

Q. Will you please state whether or not you had a contract with that party?

A. Yes, sir; we did.

Q. Have you the original contract before you?

A. I haven't it here.

Q. Where is the original contract?

A. It is attached to the original depositions in this case as Exhibit "A".

Q. Mr. Furst, as a partner of Furst & Thomas, did you sometimes write letters to your dealers or salesmen over the country?

A. Yes, sir.

Q. Did you ever have a man employed by the name of Wolfe?

A. Yes, sir.

Q. What were his initials, Mr. Furst?

A. A. V.

Q. He was employed by whom?

[fol. 111] A. By Furst & Thomas.

Q. Can you state whether or not Furst-McNess have during the last ten years employed a man by the same name and initials?

A. They haven't to my knowledge.

Q. What position did Mr. Wolfe hold with Furst & Thomas from 1919 up until the present time if he is still employed?

A. Well he was first a sales manager and at the present time is in charge of the collection department as collection manager.

Q. Mr. Furst, I hand you a letter bearing the signature of F. E. Furst dated July 10, 1922, addressed to J. G. Brewster, Warren, Arkansas, and ask you to please state whether or not that is your signature?

A. Yes, sir; it is.

Q. Did you dictate that letter?

A. I think I did.

Q. Will you attach it to your deposition and mark it as Exhibit "A"?

A. Yes, sir; I will.

Q. You have, Mr. Furst, another bearing the signature of F. E. Furst, will you state whether or not that is your signature?

A. Yes, sir.

Q. Did you dictate that letter and cause it to be mailed to James G. Brewster, Warren, Arkansas?

A. Yes, sir.

Q. Will you attach it to your deposition as Exhibit "B"? [fol. 112] A. Yes, sir.

Q. Mr. Furst, has there been any material change or reorganization in the business of Furst & Thomas since 1919?

A. No, sir.

Q. It is practically the same?

A. Yes, sir.

Q. Mr. Furst, have you before you the files which would show the correspondence between you and James G. Brewster, between your company and James G. Brewster?

A. Well, I have a file here that shows part of the correspondence between Furst & Thomas and James G. Brewster. It is not all here, I presume it is available.

Q. You do not have the original letters of course, which you wrote to Brewster, have you Mr. Furst?

A. No, I have not.

Q. Have you copies?

A. I think I have copies of all the letters, I have most of them.

Q. Will you attach copies of those letters, that is the first eight letters written to Brewster, and let them be marked in this instance as Exhibits "1" to "8," beginning with the first letter that you wrote him?

Mr. Hunter: I object to the introduction of these letters as incompetent, irrelevant and immaterial as no notice to produce having been served on the plaintiffs in this cause, or proper foundation having been laid as to the introduction of these letters.

A. I am not sure I wrote him as many as eight letters. [fol. 113] Q. I am referring to the partnership of Furst & Thomas?

A. Well if you could identify them by date or some way I could tell whether I have them or not. I haven't all of the correspondence here.

Q. Mr. Furst, are you qualified by reason of your connection with Furst & Thomas to testify with reference to the general conduct of the business and such pamphlets, books, letters, etc. as have been sent out by Furst & Thomas?

A. Yes, sir.

Q. Mr. Furst, I hane you a circulare or booklet and ask you to tell the court what that is?

By Mr. Hunter: I object to that unless proper foundation is laid as to whether this particular circular or this particular literature is connected in this case with James G. Brewster, one of the defendants in this cause.

A. This is an advertising circular for one of the products that we were selling and sending out a number of these to our dealers.

Q. Will you let that be attached as Exhibit "C" to your deposition.

By Mr. Hunter: I object to the introduction as no proper foundation has been laid and no connection with this exhibit and the defendant, James G. Brewster, no showing whether this was ever sent by Furst & Thomas to James G. Brewster or whether it was published at about the same time James G. Brewster was conducting business with Furst & Thomas.

A. I will.

Q. Will you state whether or not Furst & Thomas mailed out to their dealers or salesmen this kind of literature in [fol. 114] 1921, 1922 and 1923?

By Mr. Hunter: I object to the statement as calling for a general conclusion of the witness, not confined to the issues of this particular case.

A. As a matter of fact I do not know when it was published, I recognize it as one of the pieces of literature we did send out at one time to our dealers, but do not know whether we ever mailed it to Brewster or not.

Q. If James G. Brewster received through the mail this booklet during that period of time, would you say that it had been mailed out by Furst & Thomas?

A. Yes, I would say that it was.

Q. Now I will ask you again that this be introduced as Exhibit "C" to your deposition?

By Mr. Hunter: Same objection.

Q. I hand you here, Mr. Furst, what purports to be a testimonial blank and ask you to state whether or not Furst

& Thomas mailed those out during the years 1921, 1922 and 1923, to their dealers or salesmen?

By Mr. Hunter: Same objection as being general and not confined to this case.

A. I recognize this blank as one that we mailed out to some of our dealers at one time but I do not remember when or to who it was mailed.

Q. Will you let that be attached as Exhibit "D" to your deposition?

By Mr. Hunter: Objected to as not having the proper foundation laid for introduction as an exhibit.

[fol. 115] A. Yes, sir.

Q. Mr. Furst, I hand you what purports to be a list of goods returned for credit and ask you if you know where that was printed and by whom it was circulated, if such is a fact?

By Mr. Hunter: Objected to as incompetent, irrelevant and immaterial unless there is some showing that this particular item was in some way connected or sent to James G. Brewster.

A. I do not know where this blank was printed; at that time we were having most of our printing done outside by various firms. There is nothing on the blank to indicate who printed or where it was printed. It is a blank that was used in our business, however, and we mailed them out to our dealers.

Q. What was that blank intended to be used for?

A. It was intended to be used by the dealer to furnish us a list of unsaleable goods which he was returning to us for credit.

Q. If James G. Brewster received that through the mail during the time mentioned above, would you say that it was sent out by Furst & Thomas?

A. Yes, I would say that it was.

Q. Will you let that be attached to your deposition as Exhibit "E."

By Mr. Hunter: Objected to as no proper foundation laid and no connection showed as to J. G. Brewster.

A. I will.

[fol. 116] Q. I hand you what purports to be an invoice, Mr. Furst, will you state if you know by whom that was put out and mailed?

A. It was mailed by Furst & Thomas to James G. Brewster at Warren, Arkansas.

Q. What use was intended to be made of that?

A. This was an invoice for goods which were shipped to Mr. Brewster from our Memphis branch. That is, it is an itemized list of products with the wholesale prices.

Q. Will you let that be introduced as Exhibit "F" to your deposition?

A. Yes, sir.

Q. I hand you what purports to be a salesman's order for goods bearing the name of Furst & Thomas, Memphis, Tennessee, and ask you to state whether or not that was mailed out or issued under the authority of Furst & Thomas, if not by whom?

A. Yes, this is one of Furst & Thomas' regular order blanks, such as their dealers used to order goods.

Q. Will you let that be marked Exhibit "G" and attached to your deposition?

A. Yes, sir.

Q. I hand you what purports to be a customer's receipt and statement of account and ask you by whose authority, if you know, that was mailed or issued?

A. This is a sheet from what we call a dealer's sales book.

[fol. 117] Q. To what use was that intended being put?

A. We expected the dealer to make out these in duplicate, retaining one copy in the book as a record of his sale and give the duplicate to a customer as a receipt for any cash paid for products and a statement of account for the balance, due, if any.

Q. Will you let that be attached as Exhibit "H" to your deposition?

A. Yes, sir.

Q. I hand you, Mr. Furst, what purports to be a receipt bearing the name of Furst & Thomas. Will you please state by whose authority that was issued, if you know?

A. I would say this was issued by authority of Furst & Thomas.

Q. To what use was it directed or intended for?

A. It was mailed the dealer as a receipt for cash which he remitted in payment for goods or to apply on his account with Furst & Thomas.

Q. Will you let that be introduced as Exhibit "I" to your deposition?

A. Yes, sir.

Q. I hand you what purports to be a statement of account bearing the name of Furst & Thomas and ask you if you know what that is and by whom it was mailed out?

A. It is a statement of account or a blank such as we used to send statements to our dealers of the balance they were owing us for goods bought on credit.

Q. Will you let that be introduced as Exhibit "J"?

[fol. 118] A. I will.

Q. Mr. Furst, I hand you what purports to be a salesman's weekly report and ask you to state what it is and from whom it came?

A. This appears to be a weekly report or copy of weekly report sent to us by J. G. Brewster of Wilmar, Arkansas, showing his sales and cash receipt for the week ending December 22, 1923. It is on the form such as is commonly used by the dealers who were buying from us on credit.

Q. Who furnished statements, Mr. Furst?

A. Furst & Thomas.

Q. Will you let that be introduced as Exhibit "K" to your testimony?

A. I will.

Q. I hand you an instrument which purported to be an application for a McNess business and ask you to state, if you know, by whose authority that was mailed out or furnished?

A. This was furnished by the authority of Furst & Thomas.

Q. To what use was it intended to be put?

By Mr. Hunter: I object to that statement, "to what use was it intended to be put," the instrument speaks for itself.

A. It was intended to be filled out by any one wishing to engage in selling our products.

Q. Will you let that be introduced as Exhibit "L" to your deposition?

A. Yes, sir.

Q. Mr. Furst, I hand you what purports to be a notice of [fol. 119] returned shipping cases, and ask you to state if you know whether or not that was put out by Furst & Thomas?

A. Yes, sir; it was.

Q. Will you let that be attached as Exhibit "M" to your deposition?

A. Yes, sir.

Q. I hand you what purports to be a circular or request to send recruiting literature to prospects and ask you to state, if you know, what it is and from whom it came?

A. It is a blank furnished by Furst & Thomas.

Q. For what purpose, if you know?

A. For the purpose of dealers to send us the names of men who they have met who would be interested in selling our products.

Q. Will you let that be introduced as Exhibit "N" to your deposition?

A. Yes, sir.

Q. I hand you what purports to be an open letter to all dealers and ask you to state, if you know, please, sir, by whose authority that was put out and what it was intended for?

By Mr. Hunter: I object to the latter part of the question as to what it was intended for.

A. It is a blank published by Furst & Thomas to be mailed out to their dealers.

Q. Was that printed and sent out under the authority and direction of Furst & Thomas?

[fol. 120] A. Yes, sir.

Q. Can you state whether or not that was mailed out during the years 1921, 1922 and 1923 to your various dealers over the country as a form letter?

A. It was mailed out as a form letter in 1923. I do not think it was mailed out any other year except in 1923.

By Mr. Hunter: What time in 1923?

A. November, 1923.

Q. Will you let that be introduced as Exhibit "O" to your deposition?

By Mr. Hunter: I object to that as incompetent, irrelevant and immaterial, no showing having been made that it was mailed to J. G. Brewster.

A. Yes, sir.

Q. Mr. Furst, I hand you what purports to be an application for the sale of McNess sanitary products and ask you to state, if you know, by whom that was put out and the use intended?

A. This was put out by Furst & Thomas, to be filled out by men who wished to sell McNess products.

Q. Will you let that be introduced as Exhibit "P" to your deposition?

By Mr. Hunter: Objected to as no proper foundation has been laid and no showing of such an instrument having been mailed to J. G. Brewster.

A. Yes, sir.

Q. Now, Mr. Furst, I believe you stated awhile ago that your partnership was doing business with James G. Brew- [fol. 121] ster, whose post office address was Wilmar, Arkan[illegible] during the years 1921, 1922, 1923 and 1924 as shown by the acceptance and termination of the contract, is that true?

A. Yes, sir.

Q. I believe you stated that goods were shipped by your partnership to this party during that time or a part of that time?

A. Yes, sir.

Q. Will you state whether or not it was customary for your partnership to mail out such pamphlets, booklets and literature during that time as you have just examined and marked Exhibits "A" to "P" to your deposition?

By Mr. Hunter: I object to that because some of the exhibits show statements of account and original communications to J. G. Brewster and others of these exhibits are relating to general literature, unless the two are disconnected in the question.

A. I cannot say we mailed out such blanks during any particular year but I recognize them all as blanks that were issued by the firm of Furst & Thomas and mailed out at dif-

ferent times to our dealers. Except those that bear date, I could not say when they were published and mailed out. They were changed from time to time and some of those blanks were issued one time and never again.

Q. I hand you, Mr. Furst, what purports to be a tag or paper to be attached to shipping cases and ask you to examine it and state if you know what it is and who put it out?

[fol. 122] A. It was a tag put out by Furst & Thomas to their dealers to mark their empty shipping cases when they returned them to Furst & Thomas for credit.

Q. Will you let that be attached as Exhibit "Q" to your deposition?

A. Yes, sir.

By Mr. Hunter: I object to that unless there is some connection shown with the business of James G. Brewster on the ground that no such connection has been shown.

Q. I hand you a booklet or magazine headed "McNess Farm Magazine," and ask you to examine it and state if you know what it is or not, if you do know, please explain?

A. It is a piece of advertising literature which was published and sent out to our dealers during the summer of 1921.

Q. Will you state whether or not you mailed a copy to J. G. Brewster, the defendant in this case?

A. I could not say definitely, but I presume that we did.

Q. If he received a copy of it through the mails would you say that it came from Furst & Thomas?

A. Yes.

Q. Under whose direction and supervision was that book printed?

A. This was printed under the direction of Furst & Thomas and distributed by the McNess dealers to their customers.

Q. Will you state whether or not the matter set out in that magazine is and was authentic at the time it was published and mailed out?

By Hr. Hunter: Object to that, the magazine speaks for itself.

[fol. 123] A. It was published particularly for distribution to the customer and for that reason the name of Furst

& Thomas did not appear on it, but it was published in the name of Furst-McNess Company as manufacturers of McNess Products.

By Mr. Hunter: I move that the answer be stricken out as incompetent, irrelevant and immaterial.

Q. Do you say that it is authentic and states facts, Mr. Furst, so far as you know?

By Mr. Hunter: Same objection, being a piece of literature it speaks for itself.

A. There is something in there I am not authority on; it is supposed to be.

Q. At any rate it was put out under the supervision and authority of Furst & Thomas?

A. Yes, sir.

Q. Will you let that magazine be attached as Exhibit "R" to your deposition, Mr. Furst, please sir?

By Mr. Hunter: I object to this as no connection having been shown with J. G. Brewster.

A. Yes, sir.

Q. I believe you stated, Mr. Furst, that you could not say for sure whether that was mailed to James G. Brewster and that it was mailed out to the dealers during the year 1921?

A. Yes, it was mailed out or more often shipped to them as they ordered them with their other products.

[fol. 124] Q. I believe you stated that it was intended that they distribute them among the customers?

A. Yes, sir.

Q. I hand you what is known or headed as "New Offer for securing new salesmen" and ask you if you know what it is and by whose direction and authority it was published and mailed out?

A. It was published and mailed out by Furst & Thomas.

Q. What was the object in mailing that little book?

By Mr. Hunter: I object to that as calling for a conclusion of the witness, the instrument speaks for itself.

A. The object was to encourage our dealers to interest other men in selling McNess products.

Q. Will you let that be introduced as Exhibit "S" to your deposition?

By Mr. Hunter: I object to the exhibit, no connection having been shown with the business of James G. Brewster.

A. Yes, sir.

Q. If James G. Brewster testifies that he received that character of literature or that particular booklet from Furst & Thomas, would you say he is correct?

By Mr. Hunter: I object to that on the ground that it bases the answer on this witness on presumptive testimony of some other witness to be received in this cause. It is incompetent, irrelevant and immaterial and not proper examination of the witness. It is to make his answer contingent upon what some other witness is going to or may testify in this case. I further object because it bears date June 1, 1921, and the proper record in this case by proper evidence it has been shown that the contract with H. G. Brewster [fol. 125] was not entered into until the latter part of August, 1921.

A. I could not say as to that. It is a circular that is published by us and mailed out to our dealers.

Q. During the year 1921?

A. I could not say as to that unless it bears date and I did not see any date on it.

Q. Mr. Furst, referring to the last exhibit, which is Exhibit "S" will you state whether or not you discontinued mailing those out on June 1, 1921, or did you continue to mail them out until your supply was exhausted?

A. I really could not say as to that. We usually printed enough at the time to give one to each of our dealers; sometimes there were extra copies and sometimes there were not. Anything I would say would be merely conjecture; I don't know.

Q. I hand you here a book "Murder will out" and ask you if you recognize that issue of literature or booklet?

A. Yes, sir; I do.

Q. Do you know by whom it was published?

A. This is a piece of literature that was published by Furst & Thomas and distributed among their dealers to hand out to their customers.

Q. During what year were these mailed out or distributed, if you know?

A. I don't know exactly, but I do know that we reprinted that a number of times. We sent it for several years.

[fol. 126] Q. Over a period of years that has been frequently mentioned here?

A. I think so.

Q. Will you attach it as Exhibit "T" to your deposition, Mr. Furst, please sir?

By Mr. Hunter: Objected to as incompetent, irrevelant and immaterial, no proper foundation having been laid for the introduction of this exhibit.

A. Yes, sir.

Cross-Examination.

By Mr. Hunter.

Q. With reference to Exhibit "E", Mr. Furst, do you have any recollection of ever having seen that before, that is the figure on that exhibit?

A. No, I have no recollection.

Q. It bears no signature?

A. No.

Q. You would not be able to identify that as to the figures but only identify the blank?

A. That is one of our blanks but I do not know anything about the figures on it.

Q. With reference to Exhibit "H", were you to furnish it to the dealers free of charge or did they purchase those?

A. They purchase those from us.

Q. They could purchase them or not as they wished?

A. Yes, sir.

[fol. 127] Q. That Exhibit "H" was simply a statement that the dealer could procure for his use in dealing with his customers, was it not?

A. Yes, we sold them to them simply as a matter of convenience to them.

Q. With regard to Exhibit "M", referring to notice of returned shipping cases, and Exhibit "Q", referring to the return of those empty cases, do you know whether or not Furst & Thomas paid for those cases when they were returned by dealers?

A. Yes, they paid the dealers for them, also paid the freight on them.

Q. Do you know whether the dealer could return them or not as he desired?

A. Yes, he could return or not just as he desired.

Q. And if he returned them he was paid for them by the firm of Furst & Thomas, is that correct?

A. Yes, sir.

Q. You have no personal knowledge as to whether any of these exhibits were sent to James G. Brewster or not, outside of the Exhibit "R", Exhibit "Q", Exhibit "I", Exhibit "F" and Exhibits "A" and "B," have you?

A. No, sir; I have not.

Q. In making shipments of the goods from Memphis, to James G. Brewster, can you state who owned those goods at Memphis?

A. Furst and Thomas.

Q. You made no shipments from Freeport, to James G. Brewster?

[fol. 128] A. Not so far as I know.

Q. If any such shipments were made to James G. Brewster from Freeport it would appear from the bills of lading, would it not?

A. The bills of lading and the invoices would also show.

Q. Some of the booklets or literature sent out by you were those ordered by dealers, were they not?

A. Yes, the literature and booklets for distribution to customers were sent to the dealers just as they ordered them.

Q. Would that apply to Exhibit "R"?

A. Yes, it would.

Q. They could or could not be ordered by the dealer as he desired, is that correct?

A. Yes, sir.

Q. You don't know as to whether J. G. Brewster ordered any of the Exhibit "R" or not?

A. No, I do not.

Q. Was a charge made for those?

A. I am not sure whether there was a charge made for those booklets or not. We charged for some of the larger booklets and we also had a number that we furnished free.

Q. Do Furst-McNess Company make sales to other parties than the firm of Furst & Thomas?

A. Yes.

Q. By orders sent in by wholesale druggists or retail [fol. 129] druggists or other parties handling a similar line of products but shipped by the Furst-McNess Company?

A. Yes, sir.

Q. Have such orders been received and shipped by that company?

A. Yes, frequently.

Q. The company is engaged in the manufacture and sale of goods at wholesale then?

A. Yes, sir.

Q. And Furst & Thomas are not the sole and exclusive agents of that company, is that correct?

A. That is correct, yes, sir.

Q. Do the firm of Furst & Thomas get goods from other sources other than those manufactured by Furst-McNess Company?

A. Occasionally, yes.

Q. That would apply to such food products as coffee and articles of that character?

A. Yes, sir.

Q. With reference to your business dealings with James G. Brewster and particularly with reference to the Customers statement, Exhibit "H", did the firm of Furst & Thomas require that copies of these statements or any information regarding the dealings of James G. Brewster with his customers be filed with your company.

A. No, sir.

Q. You had no knowledge of his outstanding accounts or as to his dealings with customers?

A. No, we did not know who he sold to or how he sold the goods.

[fol. 130] Q. The only information you had was weekly reports he sent you giving the total of his sales.

A. Yes.

Q. That was simply to supply the information as to what had been sold by him?

A. Yes, sir.

Q. That weekly report was that entered by you as a record on your books showing any charges or credits in his dealings with his customers?

A. No, sir.

Q. Did you have any list of customers of James G. Brewster at any time?

A. No, sir; we did not.

Q. Did you have any knowledge as to whom he was making credit sales?

A. No, sir; we did not.

Q. Was he required to furnish you or requested to furnish you with a list of customers with whom he was dealing?

A. No, sir.

Q. With reference to the Furst-McNess Company, what is the total capital?

A. $500,000.00.

Q. What proportion of that capital is owned by you, Mr. Furst?

A. About 14 per cent.

Q. Is owned by you personally?

A. Yes, sir.

[fol. 131] Q. And how much is owned by Mr. Thomas?

A. About 4 per cent.

Q. You do not have the controlling interest of the Furst-McNess Company?

A. No, we do not.

Q. Or anywhere near the controlling interest?

A. No, sir.

Q. Mr. Furst, when in your former deposition in this case you say that Furst & Thomas distribute products manufactured by the Furst-McNess Company, explain fully what you mean by distribute?

A. I mean that we sell them to dealers in various parts of the United States. We have dealers selling these products in practically every State in the Union.

Q. When you state that you had a branch warehouse at Memphis, Tennessee, would you say that you carried a stock of goods such as were sold James G. Brewster during the time he was purchasing goods from Furst & Thomas in that warehouse?

A. Yes, sir.

Q. Those goods were not there then on consignment by Furst & Thomas in that warehouse?

A. No.

Q. Have you at any time employed salesmen on commission or salary basis?

A. We have in the State of Illinois but not outside of the State of Illinois.

[fol. 132] Q. Your dealings with James G. Brewster were entirely under the contract then that has been put in this case as Exhibit "A"?

A. No, sir.

Q. What relations are the partners of Furst & Thomas with the Furst-McNess Company, those of agent are what are your relations?

A. We are practically wholesale dealers dealing principally in the products manufactured by Furst-McNess Company.

Q. Have you any Agent's contract with them for the distribution of their products?

A. No, sir.

Re-Direct Examination.

By Mr. Ball.

Q. Mr. Furst, would you say that the answers given to the questions just asked you by Mr. Hunter would apply to the entire time in which you were dealing with J. G. Brewster?

A. Yes, sir; I would.

Q. State whether or not during the year 1921, was Furst-McNess selling to other dealers than Furst & Thomas?

A. They were selling not only that year but every year in small quantities to wholesale druggists and retail druggists.

[fols. 133-145] Q. Who is the largest stockholder in Furst-McNess Company?

A. I think H. A. Hillmer is the largest single stock holder.

By Mr. Ball: That is all.

By Mr. Hunter: That is all.

(Signed) Frank E. Furst.

Subscribed and sworn to before me this 29th day of May, A. D. 1928.

Signed A. L. Reinbold, Notary Public & Commissioner. (Seal.)

[fols. 146-148] EXHIBIT "F" TO TESTIMONY OF FRANK E. FURST

Invoice.
Order received 9/26/21.
Shipped 9/26/21 to James G. Brewster, Warren, Ark., via MOP.

Furst & Thomas

Sole Distributors of F. W. McNess Sanitary Preparations,
Freeport, Illinois.

Memphis, Tenn., 9/26/21.

Sold to James G. Brewster, ER.

[fols. 149-161] EXHIBIT "G" TO TESTIMONY OF FRANK E. FURST

Furst & Thomas, Memphis, Tenn.

Salesman's Order for Goods

Be sure to sign your orders giving shipping directions.

GENTLEMEN: Whip to me at once by —— the following goods and charge to my account.

Signed —— ——.

P. O. Address ——.
Date 5 14. File No. —.
Ship goods via —— R. R. Co, R. R. Station ——, State ——.

[fols. 162-171] EXHIBIT "M" TO TESTIMONY OF FRANK E. FURST

Notice of Returned Shipping Cases

Date —— —, ——.

Furst & Thomas, Memphis, Tenn.

DEAR SIR: Please credit my account with — empty shipping cases which I have delivered to the Railway Com-

pany here in good condition, properly crated, tagged and billed as shown by the enclosed Bill of Lading:

—— ——, Salesman.

[fols. 172-306] Exhibit "Q" to Testimony of Frank E. Furst

Empty Bottle Carriers

Return to Furst & Thomas, Chemists and Manufacturing Pharmacists, Memphis, Tennessee

Notice: To Freight Agent: These empty bottle carriers are returned freight charges collect by the authority of Furst & Thomas, who will accept them and pay charges upon delivery in good order at Memphis, Tennnessee.

Returned by —— ——. From —— ——.

[fol. 307] Note: The deposition of Fred G. Thomas, is in words and figures as follows, to wit:

Fred G. Thomas, a witness being first sworn to testify to the truth, the whole truth and nothing but the truth, testified and deposed as follows, to wit:

Q. State your name and place of residence, please?

A. Fred G. Thomas, Freeport, Illinois.

Q. You are over 21 years of age, are you?

A. I am.

Q. What is your business or profession?

A. I am a partner in the firm of Furst & Thomas.

Q. Will you state whether or not you are an active partner?

A. I am.

Q. How long have you had this connection with Furst & Thomas?

A. Since 1908.

Q. What in a general way are your duties?

A. Besides making plans for the sale of our products I handle correspondence with men in a number of states.

Q. Do you or do you not have the general supervision over all departments?

A. With Mr. Furst, I look after the sales end of the business.

Q. Do Furst & Thomas maintain a printing department?

A. They do not.

Q. Did they at any time since 1920?

A. They did not.

[fol. 308] Q. Where do they have their printing done?

A. Largely in the print shop conducted by the Furst-McNess Company.

Q. Where are your offices located?

A. At the foot of Clark Street.

Q. Does Furst & Thomas own the building?

A. They do not.

Q. Will you please state who owns it?

A. The Furst-McNess Company.

Q. Is that true of 1921, 1922 and 1923?

A. It is.

Q. Will you state whether or not since 1920 Furst & Thomas has had joint office space with any other Company or corporation?

By Mr. Hunter: Objected to as incompetent, irrelevant and immaterial.

A. We have.

Q. With whom?

A. Furst-McNess Company.

By Mr. Hunter: I move that the answer be stricken from the record for the reason stated in objection.

Q. Mr. Thomas, your partnership sells a general line of medicines, and toilet articles, is that correct?

A. We do.

Q. Will you state where you get your goods from and how you dispose of them with reference to the channel by which they reach the public.

[fol. 309] A. They are purchased largely from the Furst-McNess Company and sold through dealers scattered in different parts of the United States.

Q. Do you have contracts with those dealers or not?

A. We do have sales agreements.

Q. Do you recall having any dealings with J. G. Brewster of Arkansas?

A. I have no personal recollection of his being connected with us.

Q. Have you referred to your records and found so that you can state what they show?

A. I have not.

Q. Mr. Thomas, are you familiar with the literature and books put out by Furst & Thomas to their dealers?

A. I am.

Q. Mr. Thomas, I hand you a book which purports to be a Modern Merchant edition and ask you to state whether or not you have ever seen a book like that before?

A. I have.

Q. Will you state by whose authority and supervision those books were printed and put out?

A. Furst & Thomas.

Q. Will you state what disposition was made of them?

A. They were sent out to prospective dealers from time to time.

Q. Will you state whether or not a book of the same edition as that one was mailed to J. G. Brewster of Warren or Wilmar, Arkansas?

A. I could not say.

[fol. 310] Q. Could you say that it was not?

A. I could not.

Q. Will you state whether or not the book which you have in your hand is authentic and gives correct data on the matters on which it touches?

By Mr. Hunter: I object to the question as calling for a conclusion of the witness as to matters contained in the booklet which speaks for itself.

A. I have not read this book for a good many years so I could hardly answer this question.

Q. I will ask you this question, Mr. Thomas, your firm did not put out any literature which would be misleading or untruthful?

By Mr. Hunter: Objected to as calling for a conclusion of the witness.

A. Not if we knew it.

Q. At any rate I believe you stated that that book and others of the same copy and edition were put out under the supervision and authority of Furst & Thomas?

A. They were.

Q. Will you state whether or not they were sent out at any time during 1921, 1922, 1923 and 1924?

A. I cannot state because I do not remember the year this booklet was published.

Q. Mr. Thomas, will you take a pen and ink and write your name on the inside of the first leaf, the front leaf, in order that it might be identified as the book you are testifying about?

[fol. 311] A. I will.

Q. Mr. Thomas, I hand you a book which purports to be the McNess Modern Merchant Edition bearing the name of Furst & Thomas on the back and ask you if you have ever seen that book or others of the same edition?

A. I have.

Q. Will you state by whose authority and approval that book was edited and put out?

A. Furst & Thomas.

Q. What disposition was made of the copy?

A. Most of them were sent out to prospective dealers.

Q. Can you state whether or not J. W. Brewster of Warren, Arkansas was mailed a copy of that book?

A. I cannot.

Q. Can you say that he was not?

A. I would not.

Q. Will you state whether or not the management of Furst & Thomas approved these books before they were published and mailed out?

By Mr. Hunter: Object to that as calling for a conclusion of the witness; the book speaks for itself.

A. We did.

By Mr. Hunter: I move that the answer be stricken out for the reasons stated in the objection.

Q. Mr. Thomas, for the purpose of identifying the book which you have just testified about, will you write your [fol. 312] name in the inside of the front leaf?

A. I will.

Q. Mr. Thomas, I hand you two letters, one letter which I hand you first has Furst & Thomas typed at the bottom but no signature, will you please if you know sir, state who mailed these letters out or by whose authority they were sent out?

A. Sent out by authority of Furst & Thomas.

Q. Do you happen to recall at this time what department of Furst & Thomas sent them out?

A. The mailing department sent them out.

Q. Will you state whose stationery that letter is printed on?

A. Furst & Thomas.

Q. Can you say whether or not it was sent out with the approval and at the instance of Furst & Thomas?

A. It was.

Q. Will you let that be attached to your deposition as Exhibit "A"?

By Mr. Hunter: I object to the introduction of these two papers on the ground that there is no showing as to the date or when they may have been sent out by Furst & Thomas.

A. I will.

Q. I hand you the second letter just referred to and ask you to state if you know whether that was mailed out at the instance and by the authority of Furst & Thomas?

A. It was.

Q. Do you know whether that was mailed to J. G. Brewster or not?

A. I do not.

[fol. 313] Q. Can you say that they were not mailed to him?

A. I cannot.

Q. Will you let that be introduced as Exhibit "B" to your deposition?

By Mr. Hunter: I object to the introduction of the exhibit on the ground that there is no*t* date shown, nor proper foundation laid, no connection made with the business of J. G. Brewster.

A. I will.

Q. Mr. Thomas, do you or do you not ship goods to your branch houses outside of Freeport?

A. We do.

Q. When those goods are to be shipped from whose warehouse are they taken?

By Mr. Hunter: Objected to unless confined to the goods shipped to J. G. Brewster.

A. They are shipped from the shipping room of Furst-McNess Company.

Q. Over what period of time would that question and answer apply, Mr. Thomas, since 1920 or not?

A. Ever since we had branches.

Q. Mr. Thomas, I believe you stated that you did not recall any business transactions with James G. Brewster of Arkansas?

A. I do not.

Q. You do not intend to state that you had none, do you?

A. No, sir.

[fols. 314–318] Cross-examination

By Mr. Hunter:

Q. Mr. Thomas, when you were referring to the shipment of goods from the shipping room of Furst-McNess Company of Freeport, Illinois, you meant that these goods were shipped to Furst & Thomas at their branch, did you not?

A. Yes, sir.

Q. And the branches are maintained by Furst & Thomas?

A. Yes, sir.

Q. Who owns those goods after they are shipped to the branches of Furst & Thomas?

A. Furst & Thomas.

By Mr. Hunter: That is all.

By Mr. Ball: That is all.

(Signed) Fred G. Thomas.

Subscribed and sworn to before me this the 29th day of May, A. D. 1928.

(Signed) A. L. Reinbold, Notary Public & Commissioner. (Seal.)

[fol. 319] JAMES G. BREWSTER, after first having been duly sworn, testified on behalf of himself, the defendant, in words and figures as follows, to wit:

Direct examination

(Mr. Ball:)

Q. Your name is James G. Brewster?

A. Yes, sir.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. Where do you live?

A. Drew County, Arkansas.

Q. Drew County, Arkansas?

A. Yes, sir.

Q. You together with E. A. Davis and H. M. Beaty are being sued here for an account charged against you by Furst & Thomas in the sum of $788.53. Will you tell the jury whether or not you are in a position to say whether that account is correct or not?

A. I suppose the account is correct. I didn't keep no straight line of books with the company. I trusted to the honesty of the company.

Q. There is attached to the complaint of the plaintiff a copy of what purports to be a contract between F. E. Furst and F. G. Thomas, co-partners known as Furst & Thomas and one J. G. Brewster of Warren, Arkansas. I will ask you to look at this copy and examine it and tell the jury [fol. 320] whether or not that is a correct copy of the contract which you signed with them?

A. I cannot say for sure unless I read it all over but I think that's a copy of the contract.

Q. You are practically certain that that is the contract?

A. Yes, sir.

Q. After you signed that contract with Furst & Thomas state whether or not from time to time you received little booklets and pamphlets from Furst & Thomas dealing with the business in which you were engaged in?

A. Yes, sir; I did.

Q. There is a letter which purports to be from Furst & Thomas and without any date, "Dear Mr. Medicine Man", tell the jury whether or not you received that letter and if so where?

A. Yes, sir; I received the letter.

Q. Here is another letter attached as Exhibit "B" to the testimony of Fred G. Thomas written on the letter heading of Furst & Thomas addressed to "Dear Tomahawk Worker", go over that and state whether you received that and if so from whom?

A. Yes, sir; I received a letter like that.

Q. You received that through the mail?

A. Through the mail and with other advertising and bulletins they sent me from time to time advising me how to carry on the business for them.

Q. Here is a letter under date of May 24, 1922 written on the letter head of Furst & Thomas addressed to J. G. [fol. 321] Brewster, Warren, Arkansas, and signed Furst & Thomas by A. B. Wolf, examine that and tell the jury whether you ever signed that letter.

A. Yes, sir; I got a letter like that.

Q. There is another letter attached Exhibit "B" written on the same stationery and signed by the same party examine that and state whether you received that?

A. Yes, sir; I got that letter.

Q. There is also attached as Exhibit "C" to the testimony of A. B. Wolfe a pamphlet of book, which has on the back of it, "How to sell Cold Remedies" bearing the name of Furst & Thomas, Freeport, Illinois. I will ask you to examine that book and state whether you ever received the same and if so when?

A. I received that through the mail packed in goods that I ordered.

Q. There is also attached to the deposition of A. B. Wolfe, exhibit "D" a book, the heading on the back of it is "F. W. McNess' Sal-Tonic Facts," examine that and state whether you ever received that book and state from whom?

A. Yes, sir; I remember receiving that book on Sal-Tonic.

Q. Here are a number of letters attached to the deposition of J. A. Scott marked "Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "L" and "M" written on the letter heads of Furst & Thomas at Freeport, Illinois; all of them addressed to Jas. G. Brewster except "M". I will ask you to examine all of those

except "M" and tell the jury whether or not you received [fol. 322] those letters and from whom?

A. I remember receiving all the letters that are here.

Q. I hand you two letters written on the letter heads of Furst & Thomas both of them addressed to Jas. G. Brewster, Warren, Arkansas signed Furst & Thomas by F. W. Furst they are exhibits "A" and "B" respectively to the testimony of F. E. Furst. I will ask you to examine those and tell the jury if you received those and if so from whom?

A. I received these letters from the company.

Q. Now you state that you received the exhibits which I have asked you about so far, but you did not state how you received them?

A. By mail from Furst & Thomas.

Q. I hand you exhibit "D" to the testimony of F. E. Furst and ask you to tell the jury what that is and where you received it from?

A. I don't remember that.

Q. I hand you exhibit "E" to the testimony of F. E. Furst and ask you to examine that and state to the jury what you know and if you ever received that in the course of your business?

A. This is a blank that is used for returning empty bottle carriers.

By the Court: Did you receive that?

A. Yes, sir.

Q. Will you read the heading of it?

A. Furst & Thomas, Freeport, Illinois. This is for goods [fol. 323] returned for credit, Furst & Thomas, Freeport, Illinois, please credit my account according to terms of contract with the following goods which I have carefully packed and am today returning to you by prepaid freight.

Q. Then that is an inventory of the returned goods and merchandise?

A. Yes, sir.

Q. I hand you here a piece of paper with the name of Furst & Thomas sole distributors of F. W. McNess' Sanitary Preparations dated at Memphis, Tennessee 9/26/21 and will ask you to examine that and state whether you ever received that and tell the jury what it is?

Mr. Danaher: What exhibit is that?

Mr. Ball: Exhibit "F" to the deposition of F. E. Furst.

A. That's a statement is what I call it, of goods shipped to me by Furst & Thomas of Memphis.

Q. You received that from them you say?

A. Yes, sir.

Q. I hand you exhibit "H" to the testimony of F. E. Furst and ask you to examine it and see what date and state whether you received that?

A. That was from Furst & Thomas. That's statement of account.

Q. I hand you a slip of paper marked exhibit "I" to the deposition of F. E. Furst and ask you to tell the jury what it is and where you got it?

A. From Furst & Thomas. It's a receipt of remittance for money that I paid them.

[fol. 324] Q. I hand you a piece of paper marked exhibit "K" to the deposition of F. E. Furst and ask you to examine that and tell the jury what it is and where you got it, if you did get it anywhere?

A. From Furst & Thomas. Salesman's Weekly Report.

Q. I hand you a piece of paper marked exhibit "M" to the deposition of F. E. Furst headed "Notice of Returned Shipping Cases," I will ask you to examine that and tell where you got it and from whom?

A. That was a notice that they sent to Furst & Thomas when you returned empty shipping cases.

Q. I hand you a piece of paper marked exhibit "N" to the deposition of F. E. Furst headed "Request to send recruiting literature to prospects", I will ask you if you received that and what it is?

A. I received that from Furst & Thomas. That's something telling me how to secure new salesmen or how to put new men to work.

Q. I hand you a piece of paper headed, "An open letter to all dealers" marked exhibit "O" to the testimony of F. E. Furst and ask you to state to the jury from whom you received that?

A. From Furst & Thomas.

Q. I hand you a piece of paper marked exhibit "P" to the deposition of F. E. Furst headed, "application for the sale of F. W. McNess Sanitary high quality products", and ask you from whom you received that if you did receive it?

A. Furst & Thomas.

[fol. 325] Q. I hand you a magazine headed "McNess Family Magazine" marked exhibit "R" to the testimony of F. E. Furst and ask you to examine that and if you ever received that and if so from whom?

A. Furst & Thomas.

Q. I hand you here a book headed on the back "New offer for securing New Salesmen" marked exhibit "S" to the deposition of F. E. Furst and ask you to examine that and state from whom you received that if you did receive it from anyone?

A. Furst & Thomas.

Q. I hand you a card bearing the heading "Empty Bottle Carriers" and marked as exhibit "Q" to the position of F. E. Furst and will ask you to examine that and tell the jury from whom you received it if you did receive it from anyone?

A. I received it from Furst & Thomas.

Q. I hand you a small book headed "Murder Will Out", marked exhibit "T" to the deposition of F. E. Furst and ask you to examine that and state from whom you received it if you did receive it?

A. I received that from Furst & Thomas.

Q. I hand you another book or pamphlet marked Exhibit "C" to the testimony of F. E. Furst bearing the name of Furst-McNess Company and ask you to look that over and tell where you got it if you got it from anyone?

A. Furst & Thomas. I received it from them.

Q. You have testified that you received those pamphlets, books and literature and letters from Furst & Thomas, state [fol. 326] whether or not you are referring to the same Furst & Thomas of Freeport, Illinois, who have entered this suit against you?

A. Yes, sir.

Q. When you received them tell the jury whether or not you read them and studied them and acquainted yourself with the contents of them?

A. I did as much so as I had time. Some of them I might not have read thoroughly. I always read the advise they gave me.

Q. In the literature that they sent you and which you have identified as having received from Furst & Thomas they mention the fact to you that you would do much better by selling goods on a credit——

Mr. Danaher: The plaintiff objects to that testimony, which objecion was by the court overruled, to which ruling and action of the court the plaintiffs objected, their objections being overruled, they at the time saved their separate and several exceptions.

Q. Tell the jury whether or not you followed the company's instructions?

Mr. Danaher: To which question the plaintiffs objected, their objection being overruled, they at the time saved their separate and several exceptions.

By the Court: Repeat the question.

Q. In the literature and pamphlets that you have testified that you received from Furst & Thomas they urged that you sell the merchandise on a credit or time payment plan to customers?

[fol. 327] A. Yes, sir; they did.

Q. State whether or not you followed their advise in doing that?

A. Yes, sir.

Mr. Danaher: To which question and answer the plaintiffs objected, their objections being overruled, they at the time saved their separate and several exceptions.

Mr. Danaher: The plaintiff moves the court to exclude that testimony from consideration of the jury. Which motion is by the court overruled, to which ruling and action of the court in overruling said motion, the plaintiffs objected, their objections being overruled, they at the time saved their separate and several exceptions.

Q. State whether or not you did during the time you operated under this contract sell considerable amount of merchandise for which you were unable to collect or did not collect for?

A. I did.

Q. In the contract which has been introduced here in evidence it reads in part as follows: "Furst & Thomas also agree to give the Salesman free advice and suggestions through bulletins, booklets and letters as to the best methods of selling to consumers goods purchased by him under this contract". Tell the jury whether or not the Company did give you or send free this or suggest through booklets, and letters as the best methods of selling goods?

To which question the plaintiff objected. Their objections being overruled, they at the time saved their separate and several exceptions.

[fol. 328] A. They did send me and advise me as to the best method or how to sell and handle this.

Q. Now in the contract it was agreed that the salesman should pay Furst & Thomas the regular wholesale price for all goods sold to him by them including any balance on his account for goods previously purchased by him and remaining unpaid at date of acceptance of this contract in the following manner, to wit: On the installment plan, by paying to said Furst & Thomas in cash each week, a sum equal to not less than one-half his total cash sales and collections from such goods during said week; provided that the salesman may be required at option of Furst & Thomas to pay not less than the wholesale price of certain products designated by them and sold by him for cash or collected for during said week; provided, that by paying his account in full on or before the tenth day of each month, said Salesman shall receive a discount of 3%; if he remits cash in full with each order, he shall receive a discount of 5% from their current wholesale prices. I will ask you to tell the jury whether or not you carried out the terms of this contract the part which I have just read to you?

A. Yes, sir; I would like to just make mention of some facts. They claim that I did not send the report in. Will you allow me to tell the jury why I didn't sent them?

Q. The contract further provided that as a matter of good faith and to show what the receipts of his business are from [fols. 329-332] week to week, he agrees to send to Furst & Thomas each week a correct and fully itemized record of his business on forms provided for that purpose by them. Tell the jury whether or not the Company required you to make those reports as stated in the contract?

A. Yes, sir; it was required of me that I make reports weekly.

Q What disposition or permit did the company make for goods which you were not able to sell or did not sell?

A. They accepted them back if they were in good condition as when I received them at the same prices.

Q. Here is exhibit "O" to the deposition of F. E. Furst which you identified awhile ago and headed "An Open Let-

ter to All Dealers" dated Freeport, Illinois, November 5, 1923. You testified that you received that letter from Furst & Thomas. Your contract was dated August 24th, 1921 and it terminated to refresh your memory, as a matter of fact it terminated June 3, 1924, is that about right?

A. Yes, sir.

Q. Is this the open letter?

Mr. Ball: I want permission to read this letter.

By the Court: All right.

[fol. 333] Q. Did you or did you not return any goods to Furst & Thomas?

A. Yes, sir.

Q. Tell the jury whether or not they were accepted?

A. They were accepted except a few packages that might have been refused of a few bottles, but practically all goods that I returned were accepted.

Q. The contract, which I read awhile ago, referring to salesman's weekly report and they agreed in that they were to furnish you blanks on which to make these reports. You have identified Exhibit "K" to the testimony of F. E. Furst as a blank and I will ask you to tell the jury whether or not that blank was or was not sent you for the purpose of making a report of goods sold?

A. This was sent to me by Furst & Thomas for the purpose of making my weekly report.

Q. Tell the jury whether or not that provides a blank space in the face of it for listing the various articles sold by you during the week giving the amount of cash sales, collections from credit accounts, total cash receipts, remittances, time and trial sales and goods returned by customers?

A. Yes, sir; it does.

Q. You have identified the booklet marked Exhibit "T" to the deposition of F. E. Furst as a booklet that you received from Furst & Thomas.

Mr. Hall: I want to read this letter to the jury.

Mr. Danaher: The plaintiffs object to the reading of that [fols. 334-336] letter as being wholly outside of the issues in this case.

By the Court: The court overrules your objection. Holding that it is admissible tending to shed light on the ques-

tion of whether or not there was an agency. Objection overruled.

To which ruling and action of the Court in overruling plaintiff's objection the plaintiffs saved their separate and several exceptions.

Mr. Ball: The witness had identified this book as one which he received and I will ask permission to read it for him. The letter which I want to read appears on pages 15 and 16 of the book.

Mr. Danaher: If the letter is read we would like for him to begin at the top of the page 15 and read that which appears just before the letter.

By the Court: All right Mr. Ball read, beginning at the top of page 15 as Mr. Danaher suggested.

Mr. Ball: All right your honor.

[fol. 337] (Mr. Ball:)

Q. Mr. Brewster here is a card which purports to be a tag for shipping goods marked Exhibit "Q" to the deposition of F. E. Furst which you testified that you received from Furst & Thomas. Tell the jury what that was used for where you received it or similar ones?

A. That was used for shipping cases and empty bottle carriers, and returning cases to the Company. Furst & Thomas.

Q. I believe you testified awhile ago that you received from Furst & Thomas those exhibits, that you read them [fol. 338] and understood by the account the meaning of them and acted upon them and carried out the instructions given you, is that correct?

A. Yes, sir.

Mr. Danaher: We object to that question as leading and not what the witness has testified to. He is stating something and asking him to say, Yes.

Mr. Ball: I beg pardon, I ask him to say, yes or no.

By the Court: Gentlemen as a matter of fact that is not really material in this case.

Mr. Danaher: I don't think so either.

Mr. Ball: Don't use any language of the witness unless you are sure that he testified to that and if there is a doubt

as to it, my attention should be called to it. Get along gentlemen.

Q. In the contract between you and Furst & Thomas it provides that they agree to sell and deliver to you at their current wholesale prices their products in reasonable quantities as ordered by you. State whether or not they did do that?

Mr. Danaher: We object to that. There is no issue raised on that.

By the Court: I think that's highly immaterial. I don't see any use asking that question and at the same time I don't see any use objecting to it. There have been a number of questions asked and answered here that the court can't see the use of. Get along gentlemen.

Q. This testimony that was offered on the part of the plaintiffs' letters read to the jury in which the Company [fol. 339] charged you with neglecting and failing to carry on the business properly. Will you tell the jury whether or not you did fail to push the business?

Mr. Danaher: The plaintiffs object to that question.

By the Court: Objection is overruled. I think that is admissible.

Mr. Danaher: I admit it is to a certain extent.

By the Court: The sole question in this case and all the testimony directed to it is whether this man was an agent or whether he was a vendee and all of the testimony ought to be directed solely to those issues.

Mr. Ball: I think the court is exactly right. But they have introduced inadmissible testimony and it has gotten to the jury and I would like to ask one question.

By the Court: All right. I think you have asked a number of questions. But go ahead.

Q. Will you tell the jury why it was, if it was a fact that you did not push the business?

Mr. Danaher: The plaintiff objects, which objection was by the court overruled, to which ruling and action of the court the plaintiffs at the time saved their separate and several exceptions.

Q. If you did not push the business as strong as you should, what was the trouble and what prevented you?

Mr. Danaher: We object to that Your Honor. Which objection of the plaintiff's was overruled, to which ruling and action of the court the plaintiffs at the time saved [fol. 340] their separate and several exceptions.

A. The back reports I got some of them off and they made complaint of me not sending my weekly reports in and not working and it was on account of my family and myself being sick. Sickness is why the reports did not get in every week.

Q. Just answer the question, your family was sick?

A. Family was sick that's the reason I did not stay on the road any more than I did.

Q. I don't recall whether I asked this question or not. Tell the jury whether or not you acted upon the advice of the company in selling these products on a credit?

Mr. Danaher: We object to that question for the reason that it is not material and for the further reason that I don't know what he means by the Company.

Mr. Ball: Furst & Thomas.

By the Court: I will say that the witness has already answered that question and it was not objected to.

Q. Have you been able to collect for the merchandise that you sold?

A. No, sir.

Q. Before you signed this contract and at the time the company was writing you with reference to it, if they did write you, state whether or not you received some letters which you have lost?

A. Yes, sir; I received letters that I don't know where they are, they got misplaced.

[fol. 341] Q. Do you recall or any particular letter written you before the contract was signed as to how Furst & Thomas referred to your station or relationship with them if it developed that you signed the contract with them. What were you called if you remember?

Mr. Danaher: We object to that. Which objection is by the court overruled, to which ruling and action of the court,

the plaintiffs at the time saved their separate and several exceptions.

A. Agent.

Q. What, if anything, did they say you were taking when you signed the contract?

A. Agency.

Mr. Danaher: The plaintiffs object to both the question and answer of the witness, and ask that they be stricken from the record.

Which motion is by the court overruled, to which ruling and action of the court, the plaintiffs at the time saved their separate and several exceptions.

Q. Agency for what?

A. McNess Products.

Mr. Danaher: The plaintiffs object to both the question and answer of the witness, and ask that they be stricken from the record. Which Motion is by the court overruled, to which ruling and action of the court, the plaintiffs at the time saved their separate and several exceptions.

[fol. 342] Q. I hand you a book bearing on the back of it the following: "The McNess Modern Merchant. Furst & Thomas, Freeport, Illinois", with a picture of a team and wagon and will ask you to examine that book and state whether or not you ever received a copy of the same or not?

A. Yes, sir; I received a copy of that book.

Q. From whom?

A. Furst & Thomas.

Q. How did you receive it, through the mail?

A. Yes, sir.

Q. I hand you another book which has on the front of it the following: "A Modern Merchant, takes his store to the buyer's door" and has a red seal bearing the name "Furst-McNess Company, Freeport, Illinois, Always Good", and will ask you to examine that book and state if you ever received a copy of it and if so from whom?

A. Yes, sir; Furst & Thomas. I received a copy.

Q. About what time with reference to the date of the contract did you receive these books?

A. I received the first one before the contract and the next one some time after the contract was accepted. I don't remember the date.

Q. Tell the jury whether or not you read those books.

A. Yes, sir; I read them.

Mr. Ball: Now Your Honor please. I want to ask permission of the court to introduce not the whole book, but certain pages of the books here, and suggest that the plaintiffs have the same privilege of introducing any portions of [fols. 343-414] the book he so desires to introduce.

By the Court: The defendant is allowed to introduce such parts of the book as he seems relevant to the issue. The plaintiffs have the privilege of introducing whatever part he want to. You designate what pages you want to introduce.

Mr. Ball: For convenience there are two books, we marked one Number one and the other Number Two.

By the Court: Which is which?

Mr. Ball: The McNess Modern Merchant is Number one. And A Modern Merchant is Number two.

Mr. Ball: In "The McNess Modern Merchant Book No. 1 we desire to introduce pages 22, 23, 24, 25, 28, 29, 31, 32, 33, 37, 46 and 47 and from A Modern Merchant, Book No. 2 we desire to introduce copies of pages 28, 29, 30, 31, 32, 33, 34, 37, 38, 40, 55, 60, 62 and 63. Also pages 3, 4, 5, 6, 7, 8, 9 and 19.

By the Court: Now do you want to introduce each entire page or certain pages and sections.

Mr. Ball: It would be hard to separate the pages.

Note: Which pages of the books introduced in the record are in words and figures as follows, to wit:

. . . . . .

[fol. 415] (Mr. Danaher:)

Q. I believe you never met Furst & Thomas in person or any of their agents, you just conducted the business by correspondence?

A. Yes, sir.

Q. In making these sales of their goods, you did that at your own expense did you not?

A. I furnished the wagon and team to drive for them.

Q. You paid all the expenses of making the sales?

A. In the way of traveling I did.

Q. Any other way you did?

[fol. 416] A. They furnished me some goods.

Q. You mean the expenses of selling the goods?

A. Traveling expenses of selling the goods.

Q. Then that's the whole expense?

A. Yes, sir.

Q. You paid that yourself?

A. Yes, sir.

Q. How were you paid for your services?

A. They furnished me goods and I sold them and was to keep one half of the cash sales and collection and send them one half.

Q. Did you do that?

A. Yes, sir; one half of the cash sales and collection.

Q. Did you use the money for living expenses or for other purposes?

A. The half that I was to have I did pay living expenses.

Q. Did you send them their part of it?

A. Yes, sir.

Q. All that you collected?

A. Yes, sir.

Q. Did you send them one-half of the cash sales?

A. Yes, sir.

Q. Did you send them one-half of the collection?

A. Yes, sir.

Q. You did not use any of their half at all?

A. No, sir.

Q. Did you send them any goods back when they terminated the contract?

[fol. 417] A. I was not willing to send the goods back until I collected.

Q. Did you have any goods on hand at that time?

A. I had some.

Q. What became of them?

A. I have them now.

Q. Have you sold any since then?

A. No, sir; I didn't tell you why I didn't send the goods back, I thought that I might be able to get back on the road.

Q. You thought that you would sell them later?

A. Yes, sir.

Q. Have you any notion how much of their goods you have?

A. No, sir; I couldn't say without checking it up.

Q. Couldn't you say approximately or make a fair guess at it?

A. No, sir; you see that's been four years.

Q. Still you have the foods there at home, do you see them frequently?

A. No, sir.

Q. Where are they?

A. Upstairs at the house and I hardly ever go up there.

Q. You say that you were not willing to send them back?

A. No, sir.

Q. Why not?

A. The contract calls for me to send them back and have credit for them, but I told you awhile ago I thought my wife might be able so that I could get back on the road and collect some of that money.

[fol. 418] Q. And some of the money?

A. It would be one-half of it mine.

Mr. Danaher: Just a minute Your Honor, I think I am through.

Q. Have you kept any records to tell us how much goods that you sold that you could not collect for?

A. No, sir.

Q. All these blanks and papers that you have identified as having been received by you from Furst & Thomas, which are attached to the deposition of Mr. Furst appear as having been introduced by Mr. Furst in his deposition, did you give all of them to your attorney to take up there to be used in his deposition?

A. I brought him all the papers that I had.

Q. They are the ones that you gave him?

A. I identified them. I think they are the same papers.

Q. That's how they got up there?

A. I sent a lot of them up there.

Q. I am talking about these that are att-ched to this deposition?

A. Well, I don't know.

Mr. Danaher: Well, all right.

Redirect examination.

(Mr. Ball:)

Q. Tell the jury whether or not you turned over to us all the books, pamphlets and letters and circulars that you received from Furst & Thomas and which you had in your possession and which you had not lost?

[fol. 419] A. Yes, sir, I did.

Q. You were asked awhile ago about some left over medicine. You said that you did not know the exact amount of it, can you tell the jury whether or not its a car load or whether its a goods box of it or do you know enough about it to tell them?

A. Really I don't. I would not hardly know how to estimate it in dollars and cents and in quantity and articles. There is not a car load of it and there is not a wagon load of it, but there is some there. I would not say just how much there is.

Q. That is charged on your account against you?

A. It's charged against me. Its optional with me whether I send it back or not.

Recross examination

(Mr. Danaher:)

Q. Mr. Brewster in selling goods on a credit you followed your own judgment about whether credit was good or not didn't you

A. Yes, sir. I didn't sell it where I thought it would be difficult to collect.

Q. In other words what I am trying to get at is, did you receive any instructions or ask any instructions as to who you were to credit?

A. They give me that.

Q When?

A. They told me how to sell.

[fol. 420] Q. How did you get that?

A. In those booklets.

Q. I mean did they give you names of the parties?
A. I don't mean that.
Q. What do you mean?
A. Farmers that owner their homes. I will tell you how I did that when driving over the country I would go up to a house and tell whether a man is fixed pretty well or not. Any fellow driving over the country can do that. You can tell a renter from a landlord.
Q. Still that was left to your own judgment was it not?
A. Yes, sir.

Mr. Danaher: That is all.
Mr. Ball: That is all.
Mr. Ball: It's been agreed that Furst-McNess Company located at Freeport, Illinois is a corporation and not domesticated and authorized to do business in this state.
By the Court: Let the records show that it is agreed that Furst-McNess Company is a foreign corporation and has not been authorized to do business under the laws of the State of Arkansas; in Arkansas.

* * * * * * *

[fol. 421] Defendant rests.

Whereupon, the plaintiff's to further sustain the issues on their part introduced the following testimony, to wit:

Mr. Danaher: Your Honor we desire to offer the deposition of Frank E. Furst in evidence.
By the Court: Let it be read.

Note: Which deposition is in words and figures as follows, to wit:

Interrogatories to be Answered by Frank E. Furst

1. Where, when and from whom were the articles involved in this suit purchased by Furst & Thomas?
The articles involved in this suit were purchased by Furst & Thomas from the Furst-McNess Company at Freeport, Ill. These articles being shipped from Freeport, Illinois, to Memphis, Tenn., in car load lots as desired by Furst & Thomas.

2. Where and when were the articles involved in this suit delivered to Furst & Thomas?

They were delivered at Freeport, Illinois at various times in carload lots and shipped to Memphis, Tenn. by Furst & Thomas.

3. Do Furst & Thomas maintain warehouses at any places other than Freeport, Illinois, and if so where?

At Memphis, Tenn., Baltimore, Maryland, and Oakland, California.

4. If you answer that Furst & Thomas maintain a warehouse at Memphis, Tenn. state whether, during their transactions with J. G. Brewster, involved in this suit, they [fol. 422] kept in that warehouse such articles as they sold to J. G. Brewster?

During the time Furst & Thomas were selling goods to J. G. Brewster the articles sold to him were kept at the warehouse in Memphis, Tenn., a large stock of them being kept there.

5. Upon receipt of an order from J. G. Brewster, did Furst & Thomas ship the articles ordered from their warehouse in Memphis, Tenn., or did they order them from Furst-McNess Company?

We shipped the articles from our warehouse in Memphis, Tenn.

6. From what place were such articles shipped by Furst & Thomas to J. G. Brewster?

From Memphis, Tenn.

7. When, in your former deposition given in this case you say that Furst & Thomas distribute products manufactured by Furst-McNess Company, explain fully what you mean by the word "distribute"?

By distributing we meant that we bought the products in car load lots from the Furst-McNess Company at Freeport, Illinois, shipped them to our warehouses in Baltimore, Memphis and Oakland, and from these points we sold and shipped the goods in smaller quantities as ordered by retail dealers in localities adjacent to these branch warehouses. At Memphis for instance it was customary for us to maintain at all times a stock of from three to five carloads of products at one time, and as the orders were re- [fol. 423] ceived at our Memphis branch the goods were re-

packed and shipped by local freight or express to the dealer.

8. Give the names and addresses of persons other than Furst & Thomas who purchase from Furst-McNess Company the products manufactured by it, and afterward resell them?

Furst & Thomas handle by far the largest part of the goods manufactured by Furst-McNess Company, but the Furst-McNess Company do sell their products to wholesale druggists but I do not have the names and addresses of these wholesale druggists before me. They are located in different parts of the country. The wholesale druggists ordinarily do not order these goods to carry them in stock, but only for their local customers on orders from them.

9. On what date was the partnership of Furst & Thomas of Freeport, Illinois, formed?

It was on or about April 15th, 1908.

10. When, in answer to the eighth interrogatory in your former deposition given in this case, you say that Furst & Thomas buy from Furst-McNess Company the goods distributed by Furst & Thomas, explain exactly what you mean by the word "distributed."

By the word "distributed" we meant that we bought them in large quantities, usually carload lots, and after shipping them to our warehouses in various parts of the country we broke them up or repacked them into smaller lots which we sold and delivered to dealers on their written orders for them.

11. In that answer, by the word "distributed" did you mean "sold"?

[fol. 424] We not only meant sold but repacked in smaller lots, for delivery to the various dealers as ordered by them.

12. What is the number of shares of capital stock which have been issued by Furst-McNess Company, and paid for by the persons to whom they were issued?

Five thousand shares of capital stock, being two thousand shares of common and three thousand shares of preferred.

13. Is there in existence any written contract between Furst & Thomas and Furst-McNess Company regarding the purchase by the former from the latter of products or articles manufactured by the latter?

No there is not.

14. If so, please attach a copy of the contract to this deposition?

There is not.

15. Have Furst & Thomas ever employed any salesman?

Yes, we tried it in Illinois at one time and employed perhaps eight or ten salesman on a salary and commission basis. We did not find it practical and discontinued it in less than a year from the time it was started. These are the only salesmen that were ever employed by Furst & Thomas. All of our business is now done under regular contract with dealers, such as appears in this case.

(Signed) F. E. Furst.

[fol. 425] Mr. Danaher: Your Honor, I would now like to read the deposition of Fred G. Thomas.

By the Court: Let it be read.

Note: Which deposition is copied in the record at this time and appears in words and figures as follows, to wit:

In the Bradley County Circuit Court

Furst & Thomas, Plaintiff,

vs.

James G. Brewster et al., Defendants

Questions and Answers

No. 1. State your name, age and place of residence.

Answer. Fred G. Thomas, age 53, place of residence at Freeport, Illinois.

No. 2. State what position you hold with Furst-McNess Company of Freeport, Illinois.

Answer. I am vice-president of Furst-McNess Company.

No. 3. Under the laws of what state is Furst-McNess incorporated?

Answer. Under the laws of the State of Illinois.

No. 4. State the names of the officers of Furst-McNess Company.

Answer. Frank E. Furst is president of Furst-McNess Company, I am vice president, and Fred W. McNess is Secretary.

No. 5. Is Frank E. Furst and Fred G. Thomas, of Furst & Thomas of Freeport, Illinois, interested or stockholders in your company, and if so state in what amount?

Answer. Frank E. Furst holds three hundred (300) shares [fol. 426] in the Furst-McNess Company and I own one hundred and ten (110) shares in the Furst-McNess Company, which is a small amount of the total capitalization of Furst-McNess Company.

No. 6. State if Furst & Thomas Company of Freeport, Illinois, distributes the products you manufacture; also state the character of merchandise or products manufactured and distributed by your company.

Answer. Yes, Furst & Thomas, a co-partnership of Freeport, Illinois, distribute products manufactured by the Furst-McNess Company, but Furst & Thomas are not a company, they are a co-partnership consisting of Frank E. Furst and Fred G. Thomas. The character of merchandise or products manufactured by the Furst-McNess Company is spices, toilet articles, medicinal preparations, stock and poultry tonics, flavoring extracts and also some food products. These are the articles which are sold by the Furst-McNess Company to Furst & Thomas and are sold by Furst & Thomas to dealers, merchants or salesmen throughout the United States. Furst-McNess Company are manufacturers only and not distributors except of a few articles which they buy from other sources and do not manufacture themselves and the Furst-McNess Company sell their products through the trade to other parties than Furst & Thomas.

No. 7. State when Furst-McNess Company was organized or incorporated, giving the exact date?

[fol. 427] Answer. Furst-McNess was incorporated on February 7, 1908.

No. 8. State whether Furst & Thomas have ever been distributing agents for your merchandise and if so for how long?

Answer. Furst & Thomas have been distributing agents for the Furst-McNess Company as they buy from the Furst-McNess Company the goods distributed by Furst & Thomas; they are not the agents of the Furst-McNess Company.

No. 9. Give the names of any other distributors and their places of business, if any other than Furst & Thomas.

Answer. The Furst-McNess Company do not have any agents distributing their goods if by distributors is meant

agents. The Furst-McNess Company sell their products to any one who may apply for them and Furst & Thomas are handling and buying from the Furst-McNess Company the line of products manufactured by the Furst-McNess Company, and the products manufactured by the Furst-McNess Company are also shipped and sold by the Furst-McNess Company to druggists, physicians, grocers or any other dealers or merchants who wish to buy them and order them.

No. 10. State whether or not Frank E. Furst and Fred G. Thomas Company, of Freeport, Illinois, are one and the same persons as those by the same name who are interested in the company of Furst-McNess.

Answer. There is no Frank E. Furst and Fred G. Thomas Company of Freeport, Illinois, but there is a co-partner-[fol. 428] ship of Freeport, Illinois, which partnership consists of the members, Frank E. Furst and Fred G. Thomas and they are the same persons who hold stock in the Furst-McNess Company.

(Signed) Fred G. Thomas.

Subscribed and sworn to before me this 2nd day of August, A. D. 1927.

(Signed) A. L. Reinhold, Notary Public. (Seal.)

State of Illinois,
County of Stephenson, ss:

I, A. L. Reinhold, a Notary Public within and for the County and State aforesaid, do hereby certify that the foregoing deposition of Fred G. Thomas was taken by me on the 30th day of July, A. D. 1927, at my office, 404 Second National Bank Building, Freeport, Illinois; that previous to the testimony the said witness was duly sworn before me as required by law; that the said testimony was taken down in shorthand by me, and afterwards reduced to writing.

Witness my hand and seal, this 30th day of July, A. D. 1927.

(Signed) A. L. Reinhold, Notary Public.

Plaintiff rests.
Defendants rest.

[fol. 429] This was all the testimony on behalf of the Plaintiff.

This was all the testimony on behalf of the Defendants.

This was all the testimony on behalf of both the Plaintiff and Defendants.

This was all the testimony in the whole case.

PLAINTIFF'S REQUESTED INSTRUCTIONS TO JURY

Whereupon, the plaintiff requested the court to give the following instructions, to wit:

The Court gave the following instruction to wit:

A

I might say here that the questions in this case are, in the first place; whether Furst & Thomas were vendee's or agents of Furst-McNess Company and next was whether Brewster was a vendee or agent of Furst & Thomas. If as I have stated in this instruction you find that they were vendee under the law the plaintiff has a right to recover in this case.

To which ruling and action of the court in giving the above instruction No. A the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

The plaintiffs requested the court to instruct the jury as follows:

1

The Court tells you that a vendor is a person who has sold property to another and that the person purchasing [fol. 430] the property is called the vendee.

The court refused to give the above instruction No. 1 as requested by the plaintiff, but modified the same by adding at the end of said instruction the following:

"The court tells the jury that if you should find from the testimony in this case that Furst & Thomas purchased the products of the Furst-McNess Company and sa-d company had no further interest therein and that said Furst and Thomas sold said goods to Brewster and had no further interest therein or control thereof except to collect the purchase price from Brewster then the sa-d Furst & Thomas were the vendee's of Furst-McNess Company and not their agent and your verdict should be for the sum sued for."

To which ruling and action of the court in refusing to give instruction No. 1 as requested by the plaintiff, the plaintiff objected, its objection being overruled, it at the time saved its exceptions.

To which ruling and action of the court in modifying said instruction No. 1 as requested by the plaintiff, the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

Whereupon, the court gave the instruction No. 1 as modified which is in words and figures as follows:

The court tells you that a vendor is a person who has sold property to another and that the person purchasing [fol. 431] the property is called the vendee. The court tells the jury that if you should find from the testimony in this case that Furst & Thomas purchased the products of the Furst-McNess Company and said Company had no further interest therein and that said Furst & Thomas sold said goods to Brewster and had no further interest therein or control thereof except to collect the purchase price from Brewster then the said Furst & Thomas were the vendees of Furst-McNess Company and not their agents and Brewster was the vendee of Furst & Thomas and not their agent and your verdict should be for the plaintiffs for the sum sued for.

To which ruling and action of the court in giving said instruction No. 1 as modified by the court the plaintiff objected, its objection being overruled it at the time saved its separate and several exceptions.

2

Furst & Thomas was a partnership and had a right to do business in the State of Arkansas; and if you find that Brewster's contract was with Furst & Thomas, your verdict should be for them, whether it was a contract of sale and purchase, or a contract making Brewster their agent.

The court refused to give the above instruction No. 2 as requested by the plaintiff, but modified the same with modification is in words and figures as follows, to wit:

[fol. 432] By striking out the word "and" between the words "Arkansas" and the word "if" and putting in its

place the following: "but Furst & Thomas is a partnership and have a right to do business in the State of Arkansas, but Furst & Thomas is a foreign corporation and not having complied with the laws of Arkansas have no right to do business in the state and"

To which ruling and action of the court in modifying said instruction the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

Whereupon the court gave instruction No. 2 as modified by the court which is as follows:

Furst & Thomas was a partnership, and had a right to do business in the State of Arkansas; but Furst & Thomas is a partnership and have a right to do business in the State of Arkansas, but Furst-McNess Company is a foreign corporation and not having complied with the laws of Arkansas have not right to do business in the State and if you find that Brewster's contract was with Furst & Thomas, your verdict should be for them, whether it was a contract of sale and purchase, or a contract making Brewster their agent, unless you should further find the Furst & Thomas were the agents of Furst-McNess Company in regard to the matters in issue in this case.

To which ruling and action of the court in giving instruc-[fol. 433] tion No. 2 as modified by the court the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

3

Defendant sets up as an affirmative defense to this action that Furst & Thomas did not purchase from Furst-McNess Company the goods alleged in the complaint to have been sold by Furst & Thomas to defendant Brewster; but that Furst & Thomas were merely agents of Furst-McNess Company in their dealings with defendant, and were not acting for themselves. On these issues the burden of proof is upon the defendants, and before you can find for the defendants, you must believe from a preponderance of the evidence that Furst & Thomas did not acquire by purchase from Furst-McNess Company the goods they shipped to Brewster, but

shipped such goods for Furst-McNess Company as their agents, and had themselves no interest in said goods.

The coure refused to give said instruction No. 3 requested by the plaintiffs but modified the same, to which ruling and action of the court in refusing to give said instruction as requested the plaintiff objected, its objection being overruled, it at the time saved its several and separate exceptions.

The court modified the instruction by adding at the end as follows: "except as agents."

To which ruling and action of the court in so modifying [fol. 434] said instruction as shown above the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

Whereupon the court gave the instruction as modified which is as follows:

Defendant sets up as an affirmative defense to this action that Furst & Thomas did not purchase from Furst-McNess Company the goods alleged in the complaint to have been sold by Furst & Thomas to defendant Brewster; but that Furst & Thomas were merely agents of Furst-McNess Company in their dealings with defendants, and were not acting for themselves. On these issues the burden of proof is upon the defendants, and before you can find for the defendants, you must believe from a preponderance of the evidence that Furst & Thomas did not acquire by purchase from Furst-McNess Company the goods they shipped to Brewster, but shipped such goods for Furst-McNess Company as their agents, and had themselves no interest in said goods except as agents.

To which ruling and action of the court in giving said instruction No. 3 as modified by the court the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

4

Before you can find for the defendants, you must find that Furst & Thomas were agents of Furst-McNess Company, [fol. 435] that the contract between Brewster and Furst & Thomas was in reality one between Furst-McNess Company and Brewster, and that it was not a contract for the sale and

purchase of goods, but a contract merely making Brewster the agent of Furst-McNess Company to carry on its business in the State of Arkansas.

The court gave the above instruction No. 4 requested by the plaintiff.

5

The fact that Furst & Thomas owned stock in the corporation of Furst-McNess Company would not of itself make Furst & Thomas agents of Furst-McNess Company.

The court gave the above instruction No. 5 requested by the plaintiff.

6

The fact that F. E. Furst and F. G. Thomas were officers in the Furst-McNess Company, would not, of itself, make them agents of that company to sell its goods.

The court gave the above instruction No. 6 requested by the plaintiff.

7

A mere designation of one as agent does not make him such, but the question as to whether or not the transactions in question were sales and purchases or agency transactions must be determined by you from the evidence irrespective of such designation.

[fol. 436] The court refused to give the above instruction No. 7 as requested, but modified the same.

To which ruling and action of the court in not giving said instruction as requested the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

The court modified the instruction by adding at the end the following: "But such designations may be considered by you together with all other facts and circumstances proven in determining whether or not Furst & Thomas and Brewster were agents."

To which ruling and action of the court in modifying said instruction the plaintiff objected, its objection being overruled, it at the time saves its separate and several exceptions.

Whereupon the court gave the instruction as modified which is in words and figures as follows:

A mere designation of one as agent does not make him such, but the question as to whether or not the transactions in question were sales and purchases or agency transactions must be determined by you from the evidence irrespective of such designation, but such designations may be considered by you together with all other facts and circumstances proven in determining whether or not Furst & Thomas and Brewster were agents.

To which ruling and action of the court in giving said [fol. 437] instruction as modified the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

8

If you find from the evidence that Furst & Thomas bought the merchandise from Furst-McNess Company, and sold it to J. G. Brewster, your verdict should be for the plaintiffs.

The court refused to give the above instruction No. 8 requested by the plaintiff, but overruled same, to which ruling and action of the — plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

9

The laws of Arkansas, as expressed in sections 1826 and 1832 of Crawford & Moses Digest, have no application to this case, for the reason that they would, if so applied, contravene section one, paragraph eight, clause three, of the Constitution of the United States, giving Congress power to regulate commerce among the states, and the laws of the United States as expressed in The Code of Laws of the United States, page 1660, title 49, paragraph 3, subdivision (3) and (4), and other laws of the United States regarding interstate commerce.

The court refused to give the above instruction No. 9 requested by the plaintiff, but overruled same, to which ruling and action of the court in so doing the plaintiff objected, its objection being overruled, it at the time saved [fol. 438] its separate and several exceptions.

10

Even though you should find from the evidence that the merchandise in question never belonged to Furst & Thomas, but was the property of Furst-McNess Company, and so remained after Brewster received it, still, if you further find that Furst-McNess Company placed it in Brewster's possession for the purpose of having him sell it, that he bore the expense of making the sales, made them in his own name, and received a commission for making the sales, he was a factor, and these transactions did not constitute doing business in the State on the part of Furst-McNess Company.

The court refused to give the above instruction No. 10 requested by the plaintiff, but overruled same, to which ruling and action of the court in so doing the plaintiff objected its objection being overruled, it at the time saved its separate and several exceptions.

11

If you find from the evidence that the merchandise involved in this suit remained the property of Furst & Thomas or Furst-McNess Company, but was placed by them, or either of them, in the possession of Brewster, for the purpose of having him sell it, and that he bore the expenses of making the sales, made the sales in his own name, [fol. 439] for cash or credit, according to his own judgment, retained the proceeds of the sales, and made payments to Furst & Thomas or Furst-McNess Company only when, and in such amounts as he saw fit, or could spare the money from his living expenses, and was paid for his services the difference between the prices at which the merchandise was billed to him and the prices at which he sold it, he was merely a factor for Furst & Thomas or Furst-McNess, and your verdict should be for plaintiff.

The court refused to give the above instruction No. 11 requested by the plaintiff but overruled same, to which ruling and action of the court in so doing the plaintiff objected, its objections being overruled, it at the time saved its separate and several exceptions.

12

If you find from the evidence that the merchandise involved in this suit remained the property of Furst & Thomas or Furst-McNess Company, but was placed by them, or either of them, in the possession of Brewster, for the purpose of having him sell it, and that he bore the expenses of making the sales, made sales for cash or credit, according to his own judgment, collected the selling prices, and was paid for his services the difference between the price at which the merchandise was billed to him and the price at which he sold it, he was merely a factor for Faust & Thomas or Furst-McNess Company, and your verdict [fol. 440] should be for the plaintiff.

The court refused to give the above instruction No. 12 requested by the plaintiff but overruled same, to which ruling and action of the court in so doing the plaintiff objected, its objections being overruled, it at the time saved its separate and several exceptions.

These were all the instructions requested by the plaintiff.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Whereupon, the defendant requested the court to instruct the jury as follows, to wit:

1.

In order for the defendant to be entitled to a verdict it is necessary for him to prove two facts:

1st. That Furst & Thomas were the agents of Furst-McNess Company, and

2nd. That Brewster was the agent of Furst & Thomas.

The burden is upon the defendant to prove these two facts by a preponderance of the evidence.

The court gave the above instruction No. 1 requested by the defendant, to which ruling and action of the court in so doing the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

[fol. 441] 2.

The court tells you that an agency is a relation, created either by express or implied contract or by law, whereby one party delegates the transaction of some lawful business or the authority to do certain acts for him or in relation to his rights or property, with more or less discretionary power, to another person called the agent, who undertakes to manage the affairs and render an account thereof.

The court gave the above instruction No. 2 requested by the defendant, to which ruling and action of the court in so doing the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

3.

The court tells you that if you find from the evidence in this case that the defendant Brewster was the agent of Furst & Thomas and that Furst & Thomas was the selling agents of Furst-McNess Company that it is your duty to find for the defendant.

The court gave the above instruction No. 3 requested by the defendant, to which ruling and action of the court in so doing the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

4.

The court tells you that in determining whether Furst & Thomas were the agents of Furst-McNess Company and [fol. 442] whether Brewster was the agent of Furst & Thomas that you may take into consideration all of the testimony together with all the letters, books and other literature which has been read to you.

The court gave the above instruction No. 4 requested by the defendant, to which ruling and action of the court in so doing the plaintiff objected, its objection being overruled, it at the time saved its separate and several exceptions.

These were all the instructions requested by the defendant.

These were all the instructions requested by the plaintiff.

These were all the instructions requested by both the plaintiff and the defendant.

These were all the instructions requested in the whole case.

VERDICT

Whereupon, after argument of counsel the jury retired to the jury room to consider of their verdict and after deliberating for a time returned into court the following verdict, to wit:

"We, the jury, find for the defendant.

(Signed) L. H. DeArmond, Foreman."

[fol. 443] [Title omitted]

MOTION FOR A NEW TRIAL

Comes the plaintiffs and move the court to set aside the verdict of the jury herein and grant them a new trial for the following reasons:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The court erred in refusing to give to the jury each of the instructions 8, 9, 10, 11 and 12 as requested by the plaintiffs.

4. The court erred in modifying and giving to the jury in such modified form each of the instructions asked by the plaintiffs numbered 1, 2, 3 and 7.

5. The court erred in giving to the jury over plaintiffs' objections each of the instructions requested by the defendants numbered 1, 2, 3, and 4.

6. The court erred in admitting in evidence each of the pamphlets, forms and printed matter and extracts therefrom identified by witness Furst and Brewster as having been sent to Brewster by Furst & Thomas, over plaintiffs' objections.

Respectfully submitted, (Signed) Danaher & Danaher, Attorneys for Plaintiffs.

[fol. 444] Whereupon, the court on hearing said motion for a new trial and argument of counsel, and being well and sufficiently advised in the premises, doth overrule same, to which ruling and action of the court in overruling said motion for a new trial the plaintiff at the time objected, its objections being overruled it at the time saved its separate and several exceptions and prayed an appeal to the Supreme Court, which was granted, and the defendant was allowed 120 days in which to prepare and present to the judge for his signature and file his bills of exceptions.

ORDER SETTLING BILL OF EXCEPTIONS

And now comes the plaintiffs and by their attorneys Danaher & Danaher and present this their several bills of exceptions, taken at the trial of the above entitled cause, containing all the evidence, all instructions asked, given, modified or refused, and all proceedings had at the trial of said cause, and asks that the same be examined by the judge, approved, signed and ordered filed and made a part of the record in this case.

Which is hereby accordingly done on this the 23rd day of April, 1929.

Turner Butler, Judge of the Tenth Judicial Circuit of Arkansas.

O. K. —— ——, Attys. for Plf.
O. K. —— ——, Attys. for Deft.

[File endorsement omitted.]

BTR:rolfe

[fol. 445] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 446 & 447] Cost bill omitted in printing.

[fol. 448] Minute entry of submission, Nov. 18, 1929, omitted in printing.

[fol. 449] IN SUPREME COURT OF ARKANSAS

JUDGMENT

This cause came on to be heard upon the transcript of the record of the Circuit Court of Bradley county, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellees recover of said appellants all their costs in this Court in this cause expended, and have execution thereof.

Butler J. not participating.

[fol. 450] No. 12

IN SUPREME COURT OF ARKANSAS

FURST & THOMAS

v.

BREWSTER

OPINION

November 25, 1930.

McHANEY, J.:

This is a suit by appellants on a written contract with appellee Brewster, on which the other appellees are guarantors for Brewster, to recover a balance alleged to be due them for certain merchandise which they claim they sold to Brewster and for which they have not been paid. The contract sued on is identical in every respect, except the name of the "salesman" and the date thereof, with the contract sued on in Furst & Thomas v. Hartsell, 172 Ark. 1118. Since it is the same contract as that, we deem it unnecessary to set it out in this opinion. We there held that the contract was ambiguous, in that it was uncertain as to whether it was a contract of purchase and sale, or one of agency, and, being ambiguous, it was proper to submit the question of the effect of the contract to a jury for its determination.

Appellants are the same persons in this case as in that, and they now urge, as they did in the former case, that the contract is not ambiguous; that it is a contract of *d*ale and purchase and not of agency, and should be so declared as a matter of law; and that the former decision of this court in the Hartsell case is unsound, in conflict with former decisions, and should be overruled. We cannot agree with appellant. The same contention now made was strenuously urged in [fols. 451 & 452] the former case, and, with all the light now before us, we took the view there expressed and see no good reason to reverse ourselves and overrule that case. We, therefore, decline to do so.

It is next said that the court erred in giving certain instructions, in refusing to give certain others, and in modifying and giving as modified certain others. These assignments are so numerous it is impractical to set them out and comment on them separately. We have examined all the instructions,—those given and refused, as well as those modified, and are of the opinion that the court fully and fairly instructed the jury on the questions raised.

The main question in the case is whether the contract is ambiguous, and this has already been decided against the appellants.

We find no error and the judgment must be affirmed.

Butler, J., not participating.

[fol. 453] In Supreme Court of Arkansas

[Title omitted]

Motion for Rehearing—Filed Dec. 10, 1929

Appellants ask for a rehearing for the reason that the Court overlooked the fact that no testimony was abstracted or considered in the case of Furst & Thomas against Hartsell, 172 Ark. 1118, and that there is no testimony in this case to sustain the contention that the contract in question was between Furst-McNess Company and Brewster, or that Furst & Thomas were agents of Furst-McNess Company, or that Brewster was the agent of either.

The Court also wholly overlooked the undisputed testimony, including the admissions of Brewster, that the con-

tract was one of sale and purchase, and not one creating an agency.

The Court overlooked the fact that Brewster, in his answer, stated that the contract was between him and Furst & Thomas, a partnership, and that the goods were the property of Furst & Thomas, and that he should not have been permitted to contradict this statement.

The Court overlooked the fact that Sections 1826 and [fol. 454] 1832 as applied to the facts of this case, contravene Section One, Paragraph Eight, Clause Three, of the Constitution of the United States, giving congress the power to regulate commerce among the States, and the laws of the United States as expressed in The Code Laws of the United States, page 1660, Title 49, paragraph 3, subdivisions (3) and (4), and other laws of the United States regarding interstate commerce.

The Court overlooked the fact that all witnesses who testified regarding the relationship between Furst-McNess Company and Furst & Thomas testified that no agency existed, and that the only testimony tending to establish such an agency consisted of statements printed in pamphlets, construed by appellees to constitute admissions of such agency in connection with other transactions, and that this testimony, at most, might estop appellants and Furst-McNess Company from denying the existence of such an agency as against one who had been misled by it to his detriment, but could not establish the existence of such an agency for the purpose of precluding a recovery under the penal statute here invoked.

The court overlooked the fact that all of Brewster's own testimony showed that he considered himself the agent of Furst & Thomas, a partnership, and not of Furst-McNess Company, a corporation.

The Court overlooked the fact that it was necessary for the defendants to prove that Furst & Thomas were merely agents for Furst-McNess Company, and that they did not do so.

(Folios 455 to 458, inclusive, missing.)

[fol. 459] Respectfully submitted, Mike Danaher, Palmer Danaher, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 460] IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING MOTION FOR REHEARING—Dec. 23, 1929

Being fully advised, the petition for rehearing filed in this cause, is by the Court overruled.

[fol. 461] No. —

IN SUPREME COURT OF ARKANSAS

FURST & THOMAS

v.

HARTZELL

OPINION

Feb. 21, 1927.

MEHAFFY, J.:

The appellant, plaintiffs below, filed in the Arkansas Circuit court the following complaint: That on or about the 8th day of July, 1921, the plaintiffs and the defendant, William E. Chadwick, entered into a contract by the terms of which the plaintiffs agreed to sell and deliver, subject to the conditions contained in said contract, to the defendant, William E. Chadwick, plaintiffs' product in reasonable quantities as ordered by the defendant. The relationship of vendor and vendee, according to the terms of this contract, were to continue for so long as the contract remained in force.

By the terms of said contract the said William E Chadwick agreed to pay Furst & Thomas for all goods sold to him by them the usual wholesale price thereof, and further agreed to pay all unpaid balances due from him to them at the time of the execution of said contract, the terms and conditions of said payments being more definitely set out in the duplicate copy of said contract, which is hereto attached and made a part hereof. The said contract above referred to was subject to acceptance by the plaintiffs,

Furst & Thomas, and the same was duly accepted by them on the 2nd day of August, 1921.

Shortly after the execution of the said contract the plaintiffs began shipping to the defendant, William E. Chadwick, under instructions and orders from the said William E. Chadwick, and in accordance with the contract above re- [fol. 462] ferred to, merchandise and products of the kind contemplated at the time of the execution of said contract. The said William E. Chadwick continued to purchase merchandise and products from the plaintiffs from that time until the 24th day of December, 1923. On or about the time the purchases aforesaid began to be made by the defendant, William E. Chadwick, he, the said defendant, began to make remittances to the said Furst & Thomas, and continued to do so up until the 3rd day of January, 1924, but that no further payments have been made upon said account since that date The unpaid balance of indebtedness for goods, wares, merchandise, as above set out, due from the defendant, William E. Chadwick, to the plaintiff is the sum of $1,376.76.

As a part of the said contract the defendants, A. A. Hartzell, Charles F. Kuehen and J. A. Owen, executed a joint and several guaranty in favor of Furst & Thomas for the purpose of guaranteeing the faithful performance of the contract above referred to by the codefendant, William E. Chadwick, and to guarantee payment by him of the purchase price of all goods furnished to him on credit, as provided in said contract The said guaranty also extended to any balance on his account for goods previously purchased by him and remaining unpaid at the date of the acceptance of the contract herein referred to.

As further condition of said guaranty, the three defendants, A. A. Hartzell, Charles F. Kuehen and J. A. Owen agreed, that, three months from and after the termination [fol. 463] of the agreement above referred to and the nonpayment of his account by William E. Chadick, the guaranty of said account by said three defendants becomes absolute as to the amount due from him, and the said three defendants agreed to pay any indebtedness of the said William E. Chadick due the plaintiffs, Furst & Thomas, without any proceedings having to be taken against the said William E. Chadick. That a period of time in excess of

three months has expired since the termination of said contract. A copy of the contract aforesaid and the bond aforesaid is hereto attached, marked Exhibit "A" and made a part hereof.

A certified statement of account is hereto attached and marked Exhibit "B". That an itemized statement of account is hereto attached and marked Exhibit "C".

Attached to the complaint as Exhibit "A" was the following contract:

"This contract made and entered into at Freeport, Illinois, this 6th day of July, 1921, by and between Frank E. Furst and Fred G. Thomas, partners, doing business under the name of Furst & Thomas, of Freeport, Illinois, and William E. Chadick of Stuttgart, Arkansas, hereinafter called the salesman, witnesseth:

"That upon acceptance of this contract, Furst & Thomas agree to thereafter, unless prevented by strikes, fires, accidents, or other causes beyond their control, sell and deliver to the said salesman, on board cars at Freeport, Illinois, or at their option, at their nearest branch warehouse, at their [fol. 464] current wholesale prices, their products in reasonable quantities as ordered by him, so long as this contract is in force and his account is in satisfactory condition. Furst & Thomas also agree to give the salesman free advice and suggestions through bulletins, booklets and letters as to the best methods of selling to consumers the goods purchased by him under this contract, but it is expressly agreed that nothing contained in such advice and suggestions shall be binding upon the salesman nor shall be construed as in any way altering or modifying the terms of this contract.

"The salesman agrees to pay Furst & Thomas the regular wholesale price for all goods sold to him by them, including any balance on his account for goods previously purchased by him and remaining unpaid at date of acceptance of this contract, in the following manner, to-wit: On the installment plan, by paying to said Furst & Thomas in cash, each week, a sum equal to not less than one half his total cash sales and collections from such goods during said week; provided, that the salesman may be required, at the option of Furst & Thomas, to pay not less than the whole-

sale price of certain products designated by them and sold by him for cash or collected for during said week; provided that, by paying his account in full on or before the tenth day of each month, said salesman shall receive a discount of 3 per cent, if he remits in cash, in full with each order, he shall receive a discount of 5 per cent from the current wholesale prices.

"As a matter of good faith and to show what the re- [fol. 465] ceipts of his business are from week to week, he agrees to send to Furst & Thomas each week a correct and fully itemized record of his business on forms provided for that purpose by them. Either party shall have the right to terminate this contract by giving written notice to the other party; provided that, if the sale or purchase of goods under this contract be permanently discontinued for any reason, it is thereby terminated, and, upon its termination from any cause by either party, the salesman agrees to settle within three months the balance due said Furst & Thomas on account; provided that the salesman shall have the privilege of returning promptly after termination of contract, to Furst & Thomas, at Freeport, Illinois, by prepaid freight, his stock of unsold goods, and for all goods so returned by the salesman in original, unopened bottles and packages, Furst & Thomas agree to allow credit at the price originally charged after deducting the cost of checking, handling and putting such goods back into stock, and if, on final accounting, any balance is due the salesman, to pay the same promptly.

"This contract is subject to acceptance by Furst & Thomas at their home office in Freeport, Illinois, and when so accepted, shall immediately be in force and effect.

"Accepted at Freeport, Illinois 8-2-1921. Furst & Thomas.

Salesman sign here in ink. William Chadick.

The defendant, Wm. E. Chadick, filed separate answer, which was as follows:

[fol. 466] Defendant admits that he signed the contract mentioned and described in plaintiffs' complaint and admits that the copy of said contract annexed to plaintiffs' complaint as Exhibit A thereto is a correct copy thereof.

Defendant denies that any relation existing between this defendant and the plaintiffs, by reason of said contract, was that of vendor and vendee. Defendant denies that he was to pay for all goods delivered to him by the plaintiffs, but states that he was to pay for only such goods as were delivered to him and by him sold and delivered to the purchasers. Defendant denies that any of the goods delivered to him were purchased by him, but states that all goods so delivered to him were consigned to him to be sold, and that all goods so delivered to him, remaining unsold at the termination of the contract, were to be by him returned to the plaintiffs. That all goods delivered to defendant by the plaintiffs were manufactured by and were the property of Furst-McNess Company; that Furst & Thomas, in delivering said goods to the defendant, were acting merely as agents for and on behalf of said Furst-McNess Company, and that all deliveries so made by Furst & Thomas to this defendant were in truth and in fact made by said Furst-McNess Company. That Furst-McNess Company is a corporation, organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in Freeport, Illinois. That said Furst-McNess Company has failed to file with the Secretary of State for the State of Arkansas a copy of its charter, and has failed to file a statement of its assets and liabilities, and has failed to [fol. 467] designate its general office in the State of Arkansas, as is required by sec. 1826 of C. & M. Digest. That said Furst-McNess Company has failed to file the resolution of its board of directors and has failed to designate an agent for service in this State, as is required by Sec. 1827 of C. & M. Digest. That said Furst-McNess Company has wholly failed to comply with the laws of the State of Arkansas permitting foreign corporations to do business in Arkansas, and was not and is not authorized to do business in Arkansas.

"That Frank E. Furst, one of the plaintiffs herein, was, at all times herein mentioned, and is now, the president of Furst-McNess Company and a large stockholder therein; that Fred G. Thomas, one of the plaintiffs, herein, was, at all times herein mentioned and now is, vice-president of Furst-McNess Company and a large stockholder therein.

That the firm of Furst & Thomas was organized at the same time Furst-McNess Company was founded, and was organized for the sole purpose of distributing the products manufactured by Furst-McNess Company. That Furst & Thomas are the agents of Furst-McNess Company, and in making the contract with this defendant and in delivering the goods to this defendant, acted for and on behalf of said Furst-McNess Company, and the contract when made was, in truth and in fact, a contract between this defendant and said Furst-McNess Company, and that this defendant in the handling and selling of the products delivered by Furst & Thomas, was acting as the agent of said Furst-McNess Company. That all sales of the goods so delivered to him as aforesaid were had and made by this defendant in the State of Arkansas, as the agent of Furst-McNess Company [fol. 468] in the State of Arkansas, in violation of the statute in such cases made and provided.

"Defendant denies that he is indebted to plaintiffs in the sum of $1,376.76, or in any other sum and amount, and having fully answered, he asks that the complaint as to him be dismissed and that he have judgment for his costs."

The other defendants also filed separate answers, but it is not necessary to set them out. The appellant does not abstract any of the evidence, but sets out the instructions of the court, both those given and refused, and also motion for a new trial and judgment. Appellants do not abstract the testimony, for the reason that it does not ask any reversal of the judgment by any reference to the testimony, but relies solely on the law, and states that, whether or not the contract sued uopn is subject to the terms of what we know as the "Wingo Act". (Acts 1907, p 744) relating to non-resident corporations, is determinative of the question to be raised here.

The contract of agency by Furst & Thomas or the company manufacturing the products referred to in the contract, then their contention must fail. But they say on the other hand, if it is a contract of purchase and sale, then it refers to interstate commerce, and appellant would be entitled to recover. That is, they could if it is a contract of purchase and sale, and not ambiguous, then it was the duty of the trial court to instruct for the appellant, without submitting any questions of fact to the jury. It therefore

becomes unnecessary to determine or decide any questions except whether the contract sued on is a contract of pur- [fol. 469] chase and sale or a contract of agency, or whether it is so ambiguous as to permit evidence to determine the effect of the contract, whether it is one of purchase and sale or one of agency.

The first part of the contract, when considered alone, would be construed as a contract of purchase and sale. The question then, is whether the other parts of the contract render it ambiguous. This court has several times decided the question involving contracts somewhat similar to the one here involved, and it may be conceded that, if the contract is unambiguous, it is the province of the court to construe it and declare its purport.

In the case to which attention is called by appellant, in 115 Ark. 166, 171 S. W. 136, the contract there dealt with provided for the appointment of Clark as a traveling salesman for its products in the territory described, and no other, and agreed to furnish its products at place of shipment to said traveling salesman at such times and in such reasonable quantities as he might order, to be charged to him, in accordance with the company's price list current, etc. The medical company promised to take back all goods left in possession of the traveling salesman at the time he quit work. These are substantially the same provisions as in the contract involved here. In the case mentioned they also had an obligation of sureties, as they have in this case. The court, among oher things, stated in the case referred to:

"In construing a contract we may consider the construc- [fol. 470] tion which the parties themselves have placed upon it and the action they have taken in executing its provisions. These rules of construction, however, are not available where the terms of the contract are unambiguous. Where the terms of the contract are unambiuous, it is the province of the court to construe the contract and to declare its purport; and appellee insists that that duty here devolved upon the trial court, and that that court correctly construed the contract as one of sale, and not as a mere appointment of an agent. * * * It is clear that, if the contract between the parties constitutes a sale of the com-

modities there mentioned, there can be no doubt that the court correctly directed a verdict in favor of appellee. But the evidence upon that question is not so undisputed that it may be said as a matter of law that the contract constituted a sale of goods, and not an agency. Clark v. J. R. Watkins Medical Co. 115 Ark. 166, 171 S. W. 136.

The court reversed and remanded the above case, with directions to submit the questions of agency to the jury, with directions to render a verdict for the appellee if they find the relationship between litigants was that of vendor and vendee, rather than that of principal and agent. The court in the above case reviewed the authorities and held that the contract in that case was such as to be a question of fact for the jury as to whether the litigants were vendor and vendee, or whether the contract created an agency.

The contract of J. R. Watkins Medical Company was again before this court, and it was there held that the [fol. 471] evidence was legally sufficient to support the finding that the business out of which this litigation arose was appellant's and that appellee was but his agent. J. R. Watkins Co. v. Williams, 124 Ark. 539, 187 S. W. 653.

In the case of W. T. Rawleigh Medical Co. v. Holcomb, 126 Ark. 597, 191 S. W. 215, the court called attention to the fact that, while there were points of similarity between that case and the J. R. Watkins Medical Company case, it did not find the uncertainty in the relationship of the parties which was developed in the proof in the other case. The agreement in the case of the Rawleigh Medical Company v. Holcomb is somewhat different from the contract in the present suit. The agreement mentioned the medical company as party of the first part, and Holcomb as party of the second part, and not as salesman, and there was nothing in that contract to indicate that he was a mere salesman, and instead of letting him return the goods, in that case, the company agreed to repurchase, at wholesale prices, the goods that the second party had on hand, if they were in as good salable condition as when originally sold to him, provided that the second party, on repurchase, pay the company's actual expenses of receiving, inspecting and overlooking all such goods. It is also provided in that contract that that instrument constituted the sole and entire

agreement. W. T. Rawleigh Co. v. Holcomb, 126 Ark. 597, 191 S. W. 215.

The contract in the case now before the court expressly states that it is a contract between Furst & Thomas and Wm. E. Chadick, called the salesman. Then they agreed to [fols. 472-474] give the salesman free advice and suggestions through bulletins, booklets and letters as to the best method of selling to customers the goods purchased by him under this contract. It states that the salesman agreed to pay, etc.

Another thing about this contract is that he does not agree to pay Furst & Thomas, except according to cash sales and collections. It appears from the contract that he receives and sells them, and, after the goods have been sold, he is then to make payment, and, upon the termination of the contract, the salesman is given the privilege of returning promptly his stock of unsold goods.

We think therefore it was clearly a question of fact for the jury to determine whether the contract was one of agency or one of purchase and sale. There seems to be a very clear distinction between this contract and the contracts the court has held were free from ambiguity. It is such a contract of such doubtful meaning that the court cannot say as a matter of law that it is not a contract of agency. We think the question is thoroughly settled by the former decisions of this court, and the circuit court did not err in submitting the question to the jury, and this being the only contention of the appellant here, the judgment is affirmed.

[fol. 475] In Supreme Court of Arkansas

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed Mar. 12, 1930

Petition for Appeal

Considering themselves aggrieved by the final decision of the Supreme Court of the state of Arkansas in the above entitled cause, the appellants therein, said Frank E. Furst

and Fred G. Thomas, partners doing business under the firm name of Furst & Thomas, hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said appellants, Frank E. Furst and Fred G. Thomas, doing business under the firm name of Furst & Thomas, assign the following errors in the record and proceedings in the said case.

1. The Supreme Court of Arkansas erred in holding that appellants could not maintain an action in the courts of Arkansas against appellees to recover money due on a transaction involving interstate commerce because appellants were acting as agents of a foreign corporation, Furst-McNess Company, selling its goods in interstate commerce, which said foreign corporation had not complied with the Arkansas statutes requiring foreign corporations to file a statement of their assets and liabilities and designate an [fol. 476] agent in the state upon whom process might be served; and erred in holding that such denial of appellants' right to maintain an action did not impose a restraint on interstate commerce and unduly burden and interfere with such commerce, and was not in violation of Art I, Section 8, Clause 3 of the Constitution of the United States of America.

2. The Supreme Court of Arkansas erred in holding that sections 1826 and 1832 of the statutes of Arkansas (Crawford & Moses Digest) as construed and applied in this case so as to deny appellants' right to maintain an action in the courts of Arkansas upon a transaction involving interstate commerce are constitutional and not violative of the commerce clause of the Consfitution of the United States; and erred in not holding that said sections as so construed and applied were unconstitutional and interfered with the exclusive power of Congress to regulate interstate commerce granted by the Constitution, Art. I, Section 8, Clause 3 of the United States of America.

3. The Supreme Court of Arkansas erred in holding that sections 1826 and 1832 of the statutes of Arkansas (Craw-

ford & Moses Digest) as construed and applied in this case did not materially or directly burden interstate commerce.

4. The Supreme Court of Arkansas erred in holding that the contract between the appellants and James G. Brewster, one of the appellees, was ambiguous, and in refusing for that reason to construe it, and in holding that its construction should be left to a jury, thereby interfering with commerce among the states of the United States, and contravening Art. I, Section 8, Clause 3 of the Constitution of the United States of America giving Congress power to regulate commerce among the states.

[fol. 47] 5. The Supreme Court of Arkansas erred in holding that the laws of the state of Arkansas, as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas applied to the contract between the appellants and James G. Brewster, one of the appellees, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

6. The Supreme Court of Arkansas erred in holding that appellants could not maintain an action in the state courts of Arkansas upon a transaction involving interstate commerce because Furst-McNess Company, an Illinois corporation, and not a plaintiff in this suit, was doing business in Arkansas through appellee James G. Brewster, for the reason that such holding interfered with and burdened commerce among the states of the United States and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

7. The Supreme Court of Arkansas erred in holding that James G. Brewster, one of the appellees, was the agent of appellants, and also the agent of Furst-McNess Company, an Illinois Corporation not a party to this suit; and in holding that by reason thereof appellants could not maintain an action in the state courts of Arkansas because said Furst-McNess Company had not complied with the foreign corporation law of the state of Arkansas as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the

statutes of Arkansas, for the reason that such holding interfered with and burdened commerce among the states of the United States, and interfered with the exclusive power of Congress to regulate interstate commerce, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

[fol. 478] 8. The Supreme Court of the state of Arkansas erred in holding that appellants were the agents of Furst-McNess Company, an Illinois corporation not a party to this suit, and in holding that because appellants were such agent they could not maintain an action in the state courts of Arkansas on a transaction involving interstate commerce because said Furst-McNess Company had not complied with the foreign corporation law of Arkansas as expressed in sections 1926 and 1932 of Crawford & Moses Digest of the statutes of Arkansas, for the reason that such holding interfered with and burdened commerce among the states of the United States, and interfered with the exclusive power of Congress to regulate interstate commerce, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

9. The Supreme Court of the state of Arkansas erred in holding that appellants were the agents of Furst-McNess Company, an Illinois corporation, and that appellants in their capacity as such agents for said corporation entered into a contract with said James G. Brewster sued on in this action, and by virtue of said contract made James G. Brewster an agent of said Furst-McNess Company in the state of Arkansas, and that said James G. Brewster in selling the goods which he purchased from appellants in interstate commerce in pursuance of the terms of said contract was not acting as a merchant selling the goods for himself, but was acting as agent of said Furst-McNess Company in selling for that corporation, and that such conduct on the part of said James G. Brewster constituted a doing business in the state of Arkansas by said Furst-McNess Company which had not qualified as required by sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, and that therefore appellants could not maintain an action against said James G. Brewster; whereas in truth and in [fol. 479] fact as shown by the undisputed evidence said

James G. Brewster was not the agent of appellants or of Furst-McNess Company, and there was no evidence introduced at the trial to show that said Furst-McNess Company had ever done any business in the state of Arkansas or had any place of business therein; and the Supreme Court of Arkansas erred in holding that there was sufficient evidence to support the verdict of the jury, and in affirming the ruling of the trial court refusing to instruct the jury that sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas had no application to the case and should not be applied, because to do so would interfere with and burden commerce among the states of the United States, and would interfere with the exclusive power of Congress to regulate interstate commerce, and contravene Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

10. The Supreme Court of Arkansas erred in holding that the denial of appellants of the right to maintain an action in the state courts of Arkansas against appellees, because Furst-McNess Company, an Illinois corporation and not a party to said action, failed to comply with the provisions of sections 1825 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, was not in violation of the provisions of Amendment XIV to the Constitution of the United States of America, in that it denied the equal protection of the laws to appellants, and denied to appellants, citizens of the United States of America, the enjoyment of rights accorded in Arkansas to citizens of Arkansas, and unjustly and unreasonably discriminated against appellants, and abridged their privileges and immunities, and deprived them of their property without due process of law.

11. The Supreme Court of Arkansas erred in holding that Sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas as construed and applied in [fol. 480] this case did not abridge the privileges and immunities of appellants, citizens of the United States of America, and did not deprive appellants of their property without due process of law, and did not deny to appellants the equal protection of the laws of said state of Arkansas

in violation of the provisions of Amendment XIV, section 1 of the Constitution of the United States of America.

12. The Supreme Court of Arkansas erred in holding that the contract between the appellants and James G. Brewster, one of the appellees, was ambiguous, and in refusing, for that reason, to construe it, and in holding that its construction should be left to a jury, thereby interfering with commerce among the states of the United States, and contravening Art. I, Section 8, Clause 3 of the Constitution of the United States of America, giving Congress power to regulate commerce among the states, and the laws of the United States as expressed in The Code of Laws of the United States, page 1660, title 49, paragraph 3, subdivisions (3) and (4), and other laws of the United States governing interstate commerce.

13. The Supreme Court of Arkansas erred in holding that the laws of the State of Arkansas, as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas applied to the contract between the appellants and James G. Brewster, one of the appellees, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America, which reads as follows:

"The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The sections of Crawford & Moses Digest of the statutes of Arkansas referred to read as follows:

[fol. 481] "Every company or corporation incorporated under the laws of any other State, Territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business (a) in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabili-

ties and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served (b)."

"Any foreign corporation which shall fail to comply with the provisions of this act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the County in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered; and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid can not make any contract in this State which can be enforced by it either in law or in equity, and the complying with the provisions of this act after the date of any such contract, or after any suit is instituted thereon, shall in no way validate said contract."

[fol. 482] 14. The Supreme Court of Arkansas erred in holding that Furst-McNess Company, an Illinois corporation, and not a party to this suit, was doing business in Arkansas, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

15. The Supreme Court of Arkansas erred in holding that James G. Brewster, one of the appellees, was the agent of the appellants, for the reason that the contract sued upon was a contract of sale only, for the reason that such holding interfered with commerce among the states of the United States, and contarvened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

16. The Supreme Court of Arkansas erred in holding that James G. Brewster, one of the appellees, was the agent of Furst-McNess Company, an Illinois corporation, not a party to this suit, for the reason that such holding inter-

fered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

17. The Supreme Court of Arkansas erred in holding that the appellants were the agents of Furst-McNess Company, an Illinois Corporation, not a party to this suit, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

18. The Supreme Court of Arkansas erred in holding that the contract between appellants and James G. Brewster, one of the appellees, was a contract of agency, and not of sale, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

[fol. 483] 19. The Supreme Court of Arkansas erred in holding that appellants were the agents of Furst-McNess Company, an Illinois Corporation, and that appellants in their capacity as such agents for said corporation entered into the contract with James G. Brewster sued on in this action, and by virtue of said contract made James G. Brewster the agent of the Furst-McNess Company, and that James G. Brewster, in selling the goods which he purchased from appellants in pursuance to the terms of said contract, was not acting as a merchant selling the goods for himself, but was in reality the agent of the Furst-McNess Company and selling for that corporation, and that this conduct on the part of James G. Brewster constituted a doing business in the State of Arkansas by Furst-McNess Company in contravention of sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas. In truth and in fact, as shown by the undisputed evidence introduced in the cause said James G. Brewster was not the agent of appellants or of Furst-McNess Company and the appellants were not, in respect to the goods sold to James G. Brewster, the agents of the Furst-McNess Company, and as no evidence was introduced at the trial to show that the Furst-

McNess Company had ever done any business in the State of Arkansas, the ruling of the Arkansas Supreme Court that the evidence was sufficient to support the verdict of the jury which was, of necessity, based on a finding that James G. Brewster was the agent of the Furst-McNess Company was erroneous, and interfered with commerce among the states, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

Prayer for Reversal

For which errors the appellants, Frank E. Furst and Fred G. Thomas, partners doing business under the firm [fol. 484] name of Furst & Thomas, pray that the said judgment of the Supreme Court of the State of Arkansas dated December 23, 1929, in the above entitled cause, be reversed and a judgment rendered in favor of the said appellants, and for costs.

Danaher & Danaher, Counsel for Appellants.

[File endorsement omitted.]

[fol. 485] In Supreme Court of Arkansas

[Title omitted]

Order Allowing Appeal—Filed Mar. 12, 1930

The appellants in the above entitled suit, and each of them having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Arkansas on the 23rd day of December, 1929, and from each and every part thereof, and having presented and filed their petition for appeal, assignments of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the state of Arkansas in the above entitled cause, as provided by law, and it is

further ordered that the Clerk of the Supreme Court of the State of Arkansas shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United [fol. 486-488] States, so that he shall have the same in said court within thirty (30) days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated March 12, 1930.

Jesse C. Hart, Chief Justice, Supreme Court of Arkansas.

[File endorsement omitted.]

[fols. 489-491] Citations in usual form showing service on Henry M. Beaty et al., filed Mar. 25, 1930, omitted in printing.

[fols. 492 & 493] Certificate of Lodgment omitted in printing

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[fol. 494] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed April 24, 1930

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this Court in this cause are as follows:

1. The Supreme Court of Arkansas erred in holding that appellants could not maintain an action in the courts of Arkansas against appellees to recover money due on a transaction involving interstate commerce because appellants were acting as agents of a foreign corporation, Furst-McNess Company, selling its goods in interstate commerce, which said foreign corporation had not complied with the Arkansas statutes requiring foreign corporations to file

a statement of their assets and liabilities and designate an agent in the state upon whom process might be served; and erred in holding, that such denial of appellants' right to maintain an action did not impose a restraint on interstate commerce and unduly burden and interfere with such commerce, and was not repugnant to Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

2. The Supreme Court of Arkansas erred in holding that sections 1826 and 1832 of the statutes of Arkansas (Crawford & Moses Digest) as construed and applied in this case [fol. 495] so as to deny appellants' right to maintain an action in the courts of Arkansas upon a transaction involving interstate commerce are constitutional and not repugnant to the commerce clause of the Constitution of the United States; and erred in not holding that said sections as so construed and applied are unconstitutional and interfered with the exclusive power of Congress to regulate interstate commerce granted by the Constitution, Art. I, Section 8, Clause 3 of the United States of America.

3. The Supreme Court of Arkansas erred in holding that sections 1826 and 1832 of the statutes of Arkansas (Crawford & Moses Digest) as construed and applied in this case did not materially or directly burden interstate commerce.

4. The Supreme Court of Arkansas erred in holding that the laws of the state of Arkansas, as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas applied to the contract between the appellants and James G. Brewster, one of the appellees, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

5. The Supreme Court of Arkansas erred in holding that appellants could not maintain an action in the state courts of Arkansas upon a transaction involving interstate commerce because Furst-McNess Company, an Illinois corporation, and not a plaintiff in this suit, was doing business in Arkansas through appellee James G. Brewster, for the reason that such holding interfered with and burdened commerce among the states of the United States and contra-

vened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

6. The Supreme Court of Arkansas erred in holding that James G. Brewster, one of the appellees, was the agent of appellants, and also the agent of Furst-McNess Company, an Illinois corporation not a party of this suit; and in hold-[fol. 496] ing that by reason thereof appellants could not maintain an action in the state courts of Arkansas because said Furst-McNess Company had not complied with the foreign corporation law of the state of Arkansas as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, for the reason that such holding interfered with and burdened commerce among the states of the United States, and interfered with the exclusive power of Congress to regulate interstate commerce, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

7. The Supreme Court of the state of Arkansas erred in holding that appellants were the agents of Furst-McNess Company, an Illinois corporation not a party to this suit, and in holding that because appellants were such agent they could not maintain an action in the state courts of Arkansas on a transaction involving interstate commerce because said Furst-McNess Company had not complied with the foreign corporation law of Arkansas as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, for the reason that such holding interfered with and burdened commerce among the states of the United States, and interfered with the exclusive power of Congress to regulate interstate commerce, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

8. The Supreme Court of the state of Arkansas erred in holding that appellants were the agents of Furst-McNess Company, an Illinois corporation, and that appellants in their capacity as such agents for said corporation entered into a contract with said James G. Brewster sued on in this action, and by virtue of said contract made James G. Brewster an agent of said Furst-McNess Company in the state of Arkansas, and that said James G. Brewster in selling the goods which he purchased from appellant in interstate com-

merce in pursuance of the terms of said contract was not acting as a merchant selling the goods for himself, but was acting as agent of said Furst-McNess Company in selling [fol. 497] for that corporation and that such conduct on the part of said James G. Brewster constituted a doing business in the state of Arkansas by said Furst-McNess Company which had not qualified as required by sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, and that therefore appellants could not maintain an action against said James G. Brewster; whereas in truth and in fact as shown by the undisputed evidence James G. Brewster was not the agent of appellants or of Furst-McNess Company, and there was no evidence introduced at the trial to show that said Furst-McNess Company had ever done any business in the state of Arkansas or had any place of business therein; and the Supreme Court of Arkansas erred in holding that there was sufficient evidence to support the verdict of the jury, and in affirming the ruling of the trial court refusing to instruct the jury that sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas had no application to the case and should not be applied, because to do so would interfere with and burden commerce among the states of the United States, and would interfere with the exclusive power of Congress to regulate interstate commerce, and contravene Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

9. The Supreme Court of Arkansas erred in holding that the denial to appellants of the right to maintain an action in the state courts of Arkansas against appellees, because Furst-McNess Company ,an Illinois corporation and not a party to said action, failed to comply with the provisions of section 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, was not in violation of the provisions of Amendment XIV to the Constitution of the United States of America, in that it denied the equal protection of the laws to appellants, and denied to appellants, citizens of the United States of America, the enjoyment of rights accorded in Arkansas to citizens of Arkansas, and unjustly and unreasonably discriminated against appellants, and abridged [fol. 489] their privileges and immunities, and deprived them of their property without due process of law.

10. The Supreme Court of Arkansas erred in holding that sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas as construed and applied in this case did not abridge the privileges and immunities of appel-ants, citizens of the United States of America, and did not deprive appellants of their property without due process of law, and did not deny to appellants the equal protection of the laws of said sta'e of Arkansas in violation of the provisions of Amendment XIV, section 1 of the Constitution of the United States of America.

11. The Supreme Court of Arkansas erred in holding that Furst-McNess Company, an Illinois corporation and not a party to this suit, was doing business in Arkansas, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

12. The Supreme Court of Arkansas erred in holding that James G. Brewster, one of the appellees, was the agent of the appellants, for the reason that the contract sued upon was a contract of sale only, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

And appellees further state that only the following parts of the record as filed in this Court need be printed by the clerk for hearing in this case:

Title of paper	Record of page
[fol. 499] Complaint	2
Contract (Exhibit to complaint); omit statement of account	4
Answer and cross complaint of Brewster	17
Separate answer of Davis and Beaty	21
Amended separate answer of Brewster	23
Amended and substituted answer of Davis and Beaty	27
Amended separate answer of Davis and Beaty	32

Title of paper	Record of page
Interrogatories to Jim B. Higgins	37
Deposition of F. E. Furst (omit Exhibits A and B)	48
Deposition of James A. Scott (omit Exhibits, except bill of lading)	61
Exhibit (unnumbered) to deposition of Scott (bill of lading) lines 1 to 6, incl.; 17-19, incl. railroad stamp	70
Exhibit "T"; "T-1"; "T-2"; "T-3"; "T-4"	84
Deposition of Carrie Maurer (omit exhibits)	86
Deposition of Ruth Frank	89
Deposition of Frank E. Furst (omit A, B, C, D, E)	98
Exhibit F—lines 1 to 8, incl. only	146
Exhibit G—lines 1 to 10 only (omit Exhibits H, I, J, K, L)	149
Exhibit M—lines 1 to 11 only (omit N, O, P)	162
Exhibit Q (omit Exhibit R, S, T)	172
Deposition of Fred G. Thomas (omit exhibits)	307
Deposition of James G. Brewster (omit letter, last line, p. 329-332; omit letter p. 324-337; omit book p. 344 to middle p. 415)	319
Deposition of F. E. Furst (include all of p. 421)	421
Deposition of F. G. Thomas	425
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Order allowing appeal	485
Summons, etc.	489-491

Jesse C. Adkins, Frank F. Nesbit, Jesse C. Adkins, Frank F. Nesbit, Counsel for Appellants.

[fol. 500] Affidavit of Mailing

DISTRICT OF COLUMBIA, ss:

Frank F. Nesbit, being first duly sworn deposes and says that he is one of the attorneys for the appellants in the

above entitled cause and that he did cause to be deposited in the United States Mail, postage prepaid registered, a copy of the annexed and foregoing statement of points to be relied upon and designation of parts of the record to be printed, addressed to Clary and Ball, attorneys for the appellees, Warren, Bradley County, Arkansas, on April 21, 1930, in time to reach the said addressees in the ordinary course of the mails by April 24, 1930.

Frank F. Nesbit.

Subscribed and sworn to before me this 22d day of April, 1930.

W. D. Ellett, Notary Public, District of Columbia. (Seal.)

[fols. 501 & 502] [File endorsement omitted]

[Endorsed on cover:] File No. 34,936. Arkansas Supreme Court. Term No. 76. Frank E. Furst and Fred G. Thomas, partners doing business under the firm name of Furst & Thomas, Appellants, vs. James G. Brewster, Ed A. Davis and Henry M. Beaty. Filed April 10, 1930. File No. 34,936.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 76

FRANK E. FURST and FRED G. THOMAS partners doing business under the firm name of FURST & THOMAS, *Appellants*,

vs.

JAMES G. BREWSTER, ED. A. DAVIS and HENRY M. BEATY, *Appellees*.

On Appeal from the Supreme Court of the State of Arkansas.

STATEMENT AS TO JURISDICTION ON APPEAL.

JESSE C. ADKINS,
FRANK F. NESBIT,
M. DANAHER,
Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 805.

FRANK E. FURST and FRED G. THOMAS partners doing business under the firm name of FURST & THOMAS, *Appellants*,

vs.

JAMES G. BREWSTER, ED. A. DAVIS and HENRY M. BEATY, *Appellees*.

On Appeal from the Supreme Court of the State of Arkansas.

STATEMENT AS TO JURISDICTION ON APPEAL.

May it Please the Court:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The Act of February 14, 1925, 43 Stats. L. 937, United States Code Title 28, Section 344, provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "(a) A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution and treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, as amended by Act of April 26, 1928, United States Code Title 28, Section 861(a) substituted an appeal for a writ of error in all cases.

B

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on November 25, 1929 (R. 449, 450).

Motion and petition for rehearing were filed on December 10, 1929 (R. 459) within the time prescribed by the rules of the Supreme Court of Arkansas. The motion and petition for rehearing were denied on December 23, 1929 (R. 460).

The application for appeal was presented to the Chief Justice of the Supreme Court of Arkansas and the appeal allowed on March 12, 1930 (R. 484, 486).

C

NATURE OF THE CASE AND RULING BELOW.

The action was originally brought by appellants below to recover $788.53 the balance due on purchase price of merchandise sold by appellants to appellee Brewster. Said merchandise consisted of articles of food, drugs, and medicines; all of said merchandise was shipped in interstate commerce by appellants from Memphis, Tennessee, to said Brewster in Drew County, Arkansas, by a common carrier by railroad.

The answers originally admitted payments upon account but denied the amount of the balance owing. In amended answers (R. 23, 27) defendants set up that appellants doing business as Furst & Thomas, a partnership, were the agents of Furst-McNess Company, an Illinois corporation which had not qualified to do business as a foreign corporation in the state of Arkansas as required by section 1826 (statute quoted R. 481) of the statutes of Arkansas (Crawford & Moses Digest) by filing in the office of the secretary of state copy of its articles of incorporation, duly certified, statement of its assets and liabilities, the amount of capital employed in the state, designating its general office or place of business in the state, and naming an agent upon whom process might be served. The Furst-McNess Company was not at any time a party to the action.

And appellants further set up that because of this failure of Furst-McNess Company to qualify as a foreign corporation, appellants, individuals, and doing business as partners, could not maintain an action in courts of the state of Arkansas to enforce a contract with Brewster because of the prohibition of section

1832 of the said statutes of Arkansas (statute quoted R. 481).

The evidence showed that appellee Brewster had frequently admitted his indebtedness to appellants, and that the merchandise sold to Brewster, to recover the balance due on which this suit was instituted, was shipped to him in interstate commerce from appellants' warehouse at Memphis, Tennessee, to Brewster in Drew County, Arkansas. There was evidence that Furst & Thomas was a partnership having its principal place of business at Freeport, Illinois, and warehouses at Memphis, Tenn., Baltimore, Md., and San Francisco, Cal. The Furst-McNess Company, an Illinois corporation, manufactured medicines, drugs and food products at its factory at Freeport, Illinois. It sold some of its products directly to wholesale druggists throughout the United States, but sold most of its products to Furst & Thomas. Furst and Thomas shipped these goods to their warehouses mentioned above. There they were sold and reshipped by Furst and Thomas to itinerant and local retail dealers. Brewster was such a dealer who ordered from appellants by mail and to whom the goods were shipped in interstate commerce by appellants (R. 63, 64, 70, 98, 421, 422, 425). Appellees introduced evidence that the Furst-McNess Company had not qualified as a foreign corporation under the Arkansas statute (R. 37). There was no evidence that said Furst-McNess Company had any place of business in or did any business in Arkansas. Appellees contended that some provisions in the contract between appellants and Brewster (R. 4) tended to show that Brewster was an agent of appellants.

Appellants drew in question the validity of the said statutes of Arkansas as sought to be applied in this

case on the ground of their being repugnant to the Constitution of the United States as unduly burdening interstate commerce and as interfering with the exclusive power of Congress to regulate commerce among the states. Appellants requested the court to instruct the jury that the said Arkansas statutes had no application to the case (R. 437) and that to so apply them as to prevent appellants from maintaining an action against Brewster to recover money due on a transaction involving interstate commerce would be repugnant to ART. I, Section 8, Clause 3 of the Constitution of the United States, which the court refused to do (R. 437).

The court further, over objection by appellants, instructed the jury that while Furst & Thomas, a partnership, had a right to do business in Arkansas and could recover from Brewster even though he was their agent, said partnership, acting as an agent of Furst-McNess Company, a foreign corporation which had not qualified as such in accordance with the statutes of Arkansas, could not maintain an action in courts of Arkansas, and that if the jury found that appellants were the agents of Furst-McNess Company, a non-qualified foreign corporation, and that Brewster was appellants 'agent, then the jury should find for the appellees (R. 431, 432).

The court further instructed the jury that if appellee Brewster was the agent of appellants, and they in turn were the agents of Furst-McNess Company, a foreign corporation, not qualified in accordance with the statutes of Arkansas, the jury should find for the defendants below (R. 441); and the jury did find for the defendants below.

These rulings, instructions, and findings were

adopted and affirmed by the highest court of the state of Arkansas in which a decision could be had, to wit, the Supreme Court of Arkansas. Notwithstanding the contention of appellants that the said statutes of the state of Arkansas as so construed and applied were invalid on the ground of their being repugnant to the Constitution of the United States, and particularly to Art. I, Section 8, Clause 3, and Amendment XIV, the said Supreme Court of Arkansas decided in favor of the validity of the said statutes as so applied and construed (R. 449, 450, 460, 461-473).

The court in effect held that the state courts of Arkansas were closed to appellants and that under the provisions of the Arkansas statutes prohibiting a non-qualified foreign corporation from enforcing a contract in the Arkansas courts they could not maintain an action to recover money due on shipments of goods in interstate commerce to appellee Brewster because appellants, as individuals and partners, acted as agents of the Furst-McNess Company, an Illinois corporation, which had not qualified as required by the statute. These statutes, so applied were repugnant to the commerce clause of the Constitution of the United States and yet were held valid by the Supreme Court of Arkansas.

D

CASES BELIEVED TO SUSTAIN JURISDICTION.

The following decisions of this Court are believed to sustain the jurisdiction of this appeal:

International Text Book Co. v. Pigg, 217 U. S. 91

Sioux Remedy Co. v. Cope, 235 U. S. 197

Buck Stove & Range Co. v. Vickers, 226 U. S. 205
International Text Book Co. v. Peterson, 218 U. S. 664
Wilson-Moline Buggy Co. v. Hawkins, 223 U. S. 713 (per curiam opinion)
McCall v. California, 136 U. S. 104
Crutcher v. Kentucky, 141 U. S. 47

We respectfully submit that this Court has jurisdiction of this appeal by virtue of section 237 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

JESSE C. ADKINS,
FRANK F. NESBIT,
M. DANAHER,
Counsel for Appellants.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 76

FRANK E. FURST and FRED G. THOMAS, partners doing business under the firm name of FURST & THOMAS,
Appellants,

vs.

JAMES G. BREWSTER, ED. A. DAVIS and HENRY M. BEATY,
Appellees.

On Appeal from the Supreme Court of the State of Arkansas

BRIEF FOR APPELLANTS.

FRANK F. NESBIT,
M. DANAHER,
Attorneys for Appellants

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1930

No. 76.

FRANK E. FURST and FRED G. THOMAS, partners doing business under the firm name of FURST & THOMAS,
Appellants,

vs.

JAMES G. BREWSTER, ED. A. DAVIS and HENRY M. BEATY,
Appellees.

On Appeal from the Supreme Court of the State of Arkansas

BRIEF FOR APPELLANTS.

I.

The Opinions of the Courts Below

The opinion in the Supreme Court of Arkansas appealed from is not yet officially reported. It is reprinted for convenience in the record p. 97. The opinion is reported in 21 Southwestern (2d) 863. The judgment without the opinion is reported 180 Ark.

1167. This opinion adopts the reasoning of the same court in a similar case, *Furst & Thomas* v. *Hartzell*, officially reported 172 Ark. 118; also reprinted for convenience R. 100; also reported in 291 Southwestern 828.

II.

Statement of the Case

The action was originally brought by appellants in the Circuit Court of Bradley County, Arkansas, to recover $788.53 the balance due on purchase price of merchandise sold by appellants to appellee Brewster under a written contract with him (R. 2). Said merchandise consisted of articles of food, toilet articles, drugs, and medicines (R. 84); all of said merchandise was shipped in interstate commerce by appellants from Memphis, Tennessee, to Brewster in Drew County, Arkansas, by parcel post, express or common carrier by railroad.

The answers originally admitted payments upon account but denied the amount of the balance owing. In amended answers (R. 7, 9) defendants set up that appellants doing business as Furst & Thomas, a partnership, were agents of Furst-McNees Company, an Illinois corporation which had not qualified to do business as a foreign corporation in the state of Arkansas as required by section 1826 of the statutes of Arkansas by filing in the office of the secretary of state copy of its articles of incorporation, duly certified, statement of its assets and liabilities, the amount of capital employed in the state, designating its general office or place of business in the state, and naming an agent upon whom process might be served. The Furst-McNess Company was not at any time a party to the action.

And appellants further set up that because of this failure of Furst-McNess Company to qualify as a foreign corporation, appellants could not maintain an action in courts of the state of Arkansas to enforce a contract with Brewster and to recover the price of merchandise sold to him in interstate commerce because of the prohibition of section 1832 of the said statutes.

The Statutes in Question.

The statutes relied upon by the defendants in their pleadings, Sections 1826 and 1832 of Crawford & Moses Digest of the Statutes of Arkansas (Acts 1907, page 744) read as follows:

> "1826. Every company or corporation incorporated under the laws of any other State, Territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served.
>
> "1832. Any foreign corporation which shall fail to comply with the provisions of this act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which

the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the County in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered; and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid can not make any contract in this State which can be enforced by it either in law or in equity, and the complying with the provisions of this act after the date of any such contract, or after any suit is instituted thereon, shall in no way validate said contract."

The evidence showed that appellee Brewster had frequently admitted his indebtedness to appellants, and that the contract with Brewster was made with citizens of another state and called for the interstate shipment of goods, that the merchandise sold to Brewster, to recover the balance due on which this suit was instituted, was shipped to him in interstate commerce from appellants' warehouse at Memphis, Tennessee, to Brewster in Drew County, Arkansas. There was evidence that Furst & Thomas was a partnership having its principal place of business at Freeport, Illinois, and warehouses at Memphis, Tennessee, Baltimore, Maryland, and Oakland, California. (R. 81.) The Furst-McNess Company, an Illinois corporation, manufactured medicines, drugs and food products at its factory at Freeport, Illinois. It sold some of its products in interstate commerce directly to wholesale druggists throughout the United States, but sold most of its products to Furst & Thomas. Furst & Thomas shipped these goods to their warehouses mentioned

above. There they were sold and reshipped by Furst & Thomas in interstate commerce to itinerant and local retail dealers. Brewster was such a dealer who ordered from appellants by mail and to whom the goods were shipped in interstate commerce by appellants (R. 21, 22, 26, 37, 80, 81, 82). Memorandum bills of lading showing shipments from appellants at Memphis, Tenn., to Brewster in Arkansas are in evidence (R. 25, 26). Appellees introduced evidence that the Furst-McNess Company had not qualified as a foreign corporation under the Arkansas statute (R. 15). They also contended that appellants in making the contract with Brewster and in bringing suit against him were acting as agents of the Furst-McNess Company. There was no evidence that said Furst-McNess Company had any place of business in or did any business in Arkansas. Appellees contended that some provisions in the contract between appellants and Brewster (R. 2) and letterheads and literature introduced in evidence tended to show that Brewster was an agent of appellants.

Appellants drew in question the validity of the said statutes of Arkansas as sought to be applied in this case on the ground of their being repugnant to the Constitution of the United States as unduly burdening interstate commerce and as interfering with the exclusive power of Congress to regulate commerce among the states. Appellants requested the court to instruct the jury that the said Arkansas statutes had no application to the case and that to so apply them as to prevent appellants from maintaining an action against Brewster to recover money due on a transaction involving interstate commerce would be repugnant to Art. I, Section 8, Clause 3 of the Constitution

of the United States, which the court refused to do (R. 91).

The court further, over objection by appellants, instructed the jury that while Furst & Thomas, a partnership, had a right to do business in Arkansas and could recover from Brewster even though he was their agent, said partnership, acting as an agent of Furst-McNess Company, a foreign corporation which had not qualified as such in accordance with the statutes of Arkansas could not maintain an action in courts of Arkansas, and that if the jury found that appellants were the agents of Furst-McNess Company, a non-qualified foreign corporation, and that Brewster was appellants' agent, then the jury should find for the appellees (R. 88).

The court further instructed the jury that if appellee Brewster were the agent of appellants, and they in turn were the agents of Furst-McNess Company, a foreign corporation, not qualified in accordance with the statutes of Arkansas, the jury should find for the defendants below (R. 93); and the jury did find for the defendants below.

These rulings, instructions, and findings were adopted and affirmed by the highest court of the state of Arkansas in which a decision could be had, to wit, the Supreme Court of Arkansas. Notwithstanding the contention of appellants that the said statutes of the state of Arkansas as so construed and applied were invalid on the ground of their being repugnant to the Constitution of the United States, and particularly to Art. 1, Section 8, Clause 3, the said Supreme Court of Arkansas decided in favor of the validity of the said statutes so applied and construed (R. 97, 100).

The Supreme Court of Arkansas adopting its reasoning in the earlier case of *Furst* and *Thomas* v. *Hartzell*, 172 Ark. 118, (R. 100), while recognizing that the application of the statute which was made was repugnant to the commerce clause of the Constitution of the United States if the transactions involved were interstate commerce, took the view that if Brewster was appellants' agent, and not their vendee, the contract and transactions between them, even though requiring the interstate shipment of goods, were not interstate commerce. Appellants contended that the transactions were clearly sales (R. 2) but even if they were not, they were still interstate commerce. The court further took the view that although the corporation had no office or place of business and was not doing business in the state, the conclusion that Brewster was its agent, brought it within the state, so that the statute above quoted applied. Finally the court held that the statute applied to appellants as the agents of the foreign corporation and prevented them from maintaining an action in the state courts to enforce the contract with Brewster.

The court in effect held that the state courts of Arkansas were closed to appellants and that under the provisions of the Arkansas statutes prohibiting a nonqualified foreign corporation from enforcing a contract in the Arkansas courts they could not maintain an action to recover money due on sales and shipments of goods in interstate commerce to appellee Brewster because appellants, as individuals and partners, acted as agents of the Furst-McNess Company, an Illinois corporation, which had not qualified as required by the statute. These statutes, so applied were repugnant to the commerce clause of the Constitution of

the United States and yet were held valid by the Supreme Court of Arkansas.

III.

Specification of Errors

1. The Supreme Court of Arkansas erred in holding that appellants could not maintain an action in the courts of Arkansas against appellees to recover money due on a transaction involving interstate commerce because appellants were acting as agents of a foreign corporation, Furst-McNess Company, selling its goods in interstate commerce, which said foreign corporation had not complied with the Arkansas statutes requiring foreign corporations to file a statement of their assets and liabilities and designate an agent in the state upon whom process might be served; and erred in holding that such denial of appellants' right to maintain an action did not impose a restraint on interstate commerce and unduly burden and interfere with such commerce and was not repugnant to Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

2. The Supreme Court of Arkansas erred in holding that sections 1826 and 1832 of the statutes of Arkansas (Crawford & Moses Digest) as construed and applied in this case so as to deny appellants' right to maintain an action in the courts of Arkansas upon a transaction involving interstate commerce are constitutional and not repugnant to the commerce clause of the Constitution of the United States; and erred in not holding that said sections as so construed and applied are unconstitutional and interfered with the exclusive power of Congress to regulate interstate

commerce granted by the Constitution, Art. I, Section 8, Clause 3 of the United States of America.

3. The Supreme Court of Arkansas erred in holding that sections 1826 and 1832 of the statutes of Arkansas (Crawford & Moses Digest) as construed and applied in this case did not materially or directly burden interstate commerce.

4. The Supreme Court of Arkansas erred in holding that the laws of the state of Arkansas as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas applied to the contract between the appellants and James G. Brewster, one of the appellees, for the reason that such holding interfered with commerce among the states of the United States, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

5. The Supreme Court of Arkansas erred in holding that appellants could not maintain an action in the state courts of Arkansas upon a transaction involving interstate commerce because Furst-McNess Company, an Illinois corporation, and not a plaintiff in this suit, was doing business in Arkansas through appellees James G. Brewster for the reason that such holding interfered with and burdened commerce among the states of the United States and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

6. The Supreme Court of Arkansas erred in holding that James G. Brewster, one of the appellees, was the agent of appellants and also the agent of Furst-McNess Company an Illinois corporation not a party to this suit; and in holding that by reason thereof appellants could not maintain an action in the state courts of Arkansas because said Furst-McNess Company had

not complied with the foreign corporation law of the state of Arkansas as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, for the reason that such holding interfered with and burdened commerce among the states of the United States, and interfered with the exclusive power of Congress to regulate interstate commerce, and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

7. The Supreme Court of the state of Arkansas erred in holding that appellants were the agents of Furst-McNess Company, an Illinois corporation not a party to this suit, and in holding that because appellants were such agent they could not maintain an action in the state courts of Arkansas on a transaction involving interstate commerce because said Furst-McNess Company had not complied with the foreign corporation law of Arkansas as expressed in sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas for the reason that such holding interfered with and burdened commerce among the states of the United States, and interfered with the exclusive power of Congress to regulate interstate commerce and contravened Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

8. The Supreme Court of the state of Arkansas erred in holding that appellants were the agents of Furst-McNess Company, an Illinois corporation, and that appellants in their capacity as such agents for said corporation entered into a contract with said James G. Brewster sued on in this action, and by virtue of said contract made James G. Brewster an agent of said Furst-McNess Company in the state of

Arkansas, and that said James G. Brewster in selling the goods which he purchased from appellant in interstate commerce in pursuance of the terms of said contract was not acting as a merchant selling the goods for himself, but was acting as agent of said Furst-McNess Company in selling for that corporation and that such conduct on the part of said James G. Brewster constituted a doing business in the state of Arkansas by said Furst-McNess Company which had not qualified as required by sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas, and that therefore appellants could not maintain an action against said James G. Brewster; whereas in truth and in fact as shown by the undisputed evidence said James G. Brewster was not the agent of appellants or of Furst-McNess Company, and there was no evidence introduced at the trial to show that said Furst-McNess Company had ever done any business in the state of Arkansas or had any place of business therein; and the Supreme Court of Arkansas erred in holding that there was sufficient evidence to support the verdict of the jury, and in affirming the ruling of the trial court refusing to instruct the jury that sections 1826 and 1832 of Crawford & Moses Digest of the statutes of Arkansas had no application to the case and should not be applied, because to do so would interfere with and burden commerce among the states of the United States, and would interfere with the exclusive power of Congress to regulate interstate commerce, and contravene Art. I, Section 8, Clause 3 of the Constitution of the United States of America.

IV.

ARGUMENT

I. The Arkansas Statutes, Sections 1826 and 1832, Crawford & Moses Digest, as Applied in this Case, Unconstitutionally Regulated Interstate Commerce.

a. The contract between appellants and defendant Brewster calling for the importation of goods and merchandise from Tennessee into Arkansas for a pecuniary consideration payable by the defendant to the plaintiffs was a transaction of interstate commerce.

Under the terms of the contract (R. 2) made by Brewster of Warren, Arkansas, with Furst & Thomas at Freeport, Illinois, they agreed to sell and deliver merchandise to him from their nearest branch warehouse, which was located at Memphis, Tennessee (R. 26). Pursuant to this contract goods and merchandise were shipped from Memphis, Tennessee, to Brewster in Warren, Arkansas. A contract between citizens of different states, calling for the interstate sale and transportation of goods, the importation of goods into one state from another state marks the transaction as one in interstate commerce. The transactions were sales and should be so construed by this court, but they were interstate commerce in any event. The only suggestion that it was not such is that involved in the reasoning of the Supreme Court of Arkansas in their opinion in *Furst & Thomas* vs. *Hartzell*, (R. 100) which was relied upon and impliedly incorporated by reference in the opinion in this case, where it is suggested that if the contract between Furst & Thomas

and Brewster was one of purchase and sale it was interstate commerce, but if Brewster was an agent of Furst & Thomas and of the non-resident foreign corporation and the goods were consigned to him to be sold and he owed the appellants the balance due under his contract with them, the transaction between them and Brewster would not be interstate commerce, and the provisions of the Arkansas statute would prevent the appellants from maintaining a suit on the contract. The Supreme Court of Arkansas devotes no discussion or consideration to the decisions of this court in reaching its conclusion which is merely stated in a sentence. The Supreme Court of Arkansas had previously recognized that this statute could not be applied to interstate commerce in *W. T. Rawleigh Medical Co.* vs. *Rose*, 133 Ark. 505. Its decision in this case therefore rests entirely on the ground that the contract and transactions involved were not in interstate commerce.

The transaction is not taken out of the field of interstate commerce by the mere designating of one party as the agent of the other. As between them if the contract involves the interstate carriage of goods, interstate payment therefor and mercantile intercourse between citizens of different states, it is a transaction in interstate commerce, whether one is the vendee, agent, consignee or factor of the other. The Supreme Court of Arkansas takes altogether too narrow a view of what constitutes interstate commerce and overlooks the fact that the basis of the suit brought was the contract and transactions between Furst & Thomas and Furst-McNess Company on the one hand and Brewster on the other involving the interstate transportation of goods and not any contracts

or transactions between Brewster and other citizens of Arkansas.

Brewster owed Furst & Thomas the price of the goods sold him and transported in interstate commerce from Tennessee to Arkansas irrespective of whether he was their agent or not. He agreed to pay it to them at Freeport, Illinois. The transactions between him and Furst & Thomas were transactions in interstate commerce and they were not deprived of this character and made into intrastate transactions by calling Brewster agent for Furst & Thomas and for Furst-McNess Company, a foreign corporation.

This Court said in *Welton* v. *Missouri*, 91 U. S. 275, 280, 23 L. ed. 347, 349:

> "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities."

It said in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239:

> "The commerce clause of the Constitution Art. I, Section 8, Clause 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another but comprehends all commercial intercourse between different states and all the component parts of that intercourse."

In *International Text-Book Co. v. Pigg*, 217 U. S. 107, 54 L. ed. 685, this court, in passing upon a similar interference with interstate commerce by a statute of

the state of Kansas where the company maintained agents for the purpose of soliciting and obtaining contracts with students, said, quoting with approval the language of Judge Sanborn, in *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167, 183.

> " 'all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract trade and dealing between citizens of different states which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce.' If intercourse between persons in different states by means of telegraphic messages conveying intelligence or information is commerce among the states which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states within the meaning of the Constitution, especially where, as here, such intercourse and communication really relate to matters of regular continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business. In our further consideration of this case we shall assume that the business of the Text-Book Company by means of correspondence through the mails and otherwise between Kansas and Pennsylvania was interstate in its nature."

Butler Bros. Shoe Co. v. United States Rubber Co. cited above, in which certiorari was denied, 212 U. S. 577, and which was quoted with approval in International Text-Book Co. *v.* Pigg *supra* dealt with the

constitutionality of a statute of the state of Colorado, under the terms of which the United States Rubber Company was prevented from maintaining an action in the courts of Colorado against Butler Bros. Shoe Company, doing business in Denver, Colorado, with citizens of Colorado. The principal contention made before the Circuit Court of Appeals was that inasmuch as the contract between the United States Rubber Co. and Butler Bros., on which the action was brought, was a factorage contract by which Butler Bros. Co. received goods on consignment from the United States Rubber Co. and sold them in the state of Colorado, it was not a transaction in interstate commerce and therefore the state of Colorado might constitutionally prohibit the maintaining of an action upon it by the Rubber Co. in the Colorado courts. The United States Rubber Company had its principal office in New York and a warehouse in Chicago from which it shipped merchandise to consignees and purchasers. Butler Bros. Co. was engaged in the purchase and sale of rubber goods at Denver, Colorado. By the contract involved in the suit the Rubber Company appointed the Butler Bros. Co. its agents to sell and agreed to consign to it at Denver certain goods at agreed prices, the Butler Bros. Company to pay the Rubber Company the agreed prices. Pursuant to this contract the Rubber Company shipped from its warehouse in Chicago, Illinois, and its mill in New Jersey to Denver, goods and merchandise called for by the orders of the Butler Bros. Co. In passing upon the contention that as the Butler Bros. Co. was only the agent of United States Rubber Co. the transactions and contract between them upon which suit was brought by the Rubber Co. were not transactions in interstate commerce,

Mr. Justice Sanborn for the Circuit Court of Appeals for the Eighth Circuit said:

> "Nor is the fact that these contracts did not evidence sales of the goods determinative of this question. A sale is not the test of interstate commerce. All sales of sound articles of commerce which necessitate the transportation of the goods sold from one state to another, are interstate commerce; but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons, or information is a transaction of interstate commerce. 'Since the case of Gibbons v. Ogden, 9 Wheat, 1, 6 L. ed. 23,' said Chief Justice Waite in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 24, L. Ed. 7-8, 'it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress.' The contracts before us constituted and caused commercial intercourse between citizens of different states. Their chief purpose and their principal effect were the importation of sound articles of commerce into the state of Colorado from other states, and they necessarily constituted transactions of interstate commerce." (Citing cases)

In *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. Ed. 336, this Court had under consideration the validity of a license tax imposed under an ordinance of the City of Greensboro, North Carolina, on the business of selling picture frames and photographs. It was contended that interstate commerce was not involved

because the shipments of picture frames which were said to be taxable under the ordinance were not made directly from another state to purchasers in North Carolina but were made from Illinois to an agent of the shipper in North Carolina who in turn sold them to purchasers in North Carolina. This court held that that fact did not deprive the transactions of their character as interstate commerce, saying:

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.
>
> "Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

In *Adair* v. *United States,* 208 U. S. 161, 177, 52 L. Ed. 436, 443, the court said:

> "Commerce among the several states comprehends traffic, intercourse, trade navigation, communication, the transit of persons, and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several states, but not that commerce 'completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states.'"

The contract and transactions between the appellants and the appellee Brewster was commercial intercourse between different states, involved the interstate transportation of goods by common carrier by railroad, the interstate transmission of orders and payments by mail and were by every test and definition laid down by this court transactions in interstate commerce. The cause of action upon which the suit was brought was one arising between citizens of different states to recover money due for the interstate transportation of goods and it was in no sense a transaction "completely internal which is carried on between man and man in a state * * * which does not extend to or affect other states." The transactions could not be deprived of their interstate character and rendered intrastate and outside the exclusive regulation by Congress by the mere device of calling appellee Brewster an agent of appellants and of the foreign corporation, Furst-McNess Company. We submit that there was no evidence upon which it could be found or upon which the jury could be permitted to find that Brewster was the agent of either the appellants or the Furst-

McNess Company. He bought goods from them. But it is not necessary to decide that question. The appellants were entitled to recover the money due on the contract and transactions arising out of interstate commerce from Brewster, even if he were their agent and the trial court so instructed the jury. (R. 88). But the court took the mistaken view that if Brewster was the agent of Furst & Thomas and of Furst-McNess Company, the non-qualified foreign corporation, the transactions *between them* were then not transactions in interstate commerce and appellants as the agent of a non-qualified foreign corporation could not maintain their action because of the provisions of the Arkansas statute above referred to. The case was brought within the operation of the Arkansas statute and taken outside of the field of interstate commerce in the opinion of the courts below at one stroke by holding that Brewster was the agent of appellants and they in turn were the agents of the Furst-McNess Company. Under the decisions of this court such a device was ineffectual to transform the character of the transactions between the appellants and Brewster from interstate commerce into intrastate commerce. Even if Brewster was the agent of appellants and of the foreign corporation the contract and transactions *between them and him* were transactions in interstate commerce, and these were the only transactions involved in the suit brought by appellants.

It is submitted that the record shows that the transactions out of which this suit arose were sales and transactions in interstate commerce involving commercial intercourse between citizens of different states and the interstate importance and transportation of goods. The transactions remained such irrespective

of the fictional legal form which may have been imposed upon the relationship between appellants and Brewster by the rulings of the court below.

b. These statutes were relied upon as the sole ground for denying the appellants' right to maintain an action to recover money due from Brewster.

Brewster had frequently admitted his indebtedness in writing to the appellants (R. 27) and no evidence was introduced to show that he was not indebted to the appellants in the amount claimed or upon the transactions relied upon. All of the appellee's evidence was devoted to sustaining the defense set out in the amended answer (R. 7, 8, 9) that Furst & Thomas were the agents of Furst-McNess Company, a corporation of the State of Illinois which was not authorized to do business in the State of Arkansas and which had not complied with the statutes of that state by filing with the secretary of state a copy of its charter, a statement of its assets and liabilities and designating a general office and agent for the service of process. It was alleged that appellants contracted with appellee and sued only as agents for the Furst-McNess Company, a foreign corporation (R. 8, 9) and that the suit was in legal effect a suit by said foreign corporation. The trial court took this view and so instructed the jury (R. 88, 93). A deposition of the Secretary of State of Arkansas was taken showing that the Furst-McNess Company had not qualified to do business as provided in Section 1826 Crawford & Moses Digest, Statutes of Arkansas (R. 15, 16). It was urged that neither Furst-McNess Company nor appellants as their agents could maintain any action in the Arkansas courts to enforce the con-

tract with Brewster because of the provisions of Section 1832 of the statutes. The appellants requested the court to instruct the jury that these statutes had no application to the case and did not constitute any defense for the reason that the transactions involved in the suit were transactions in interstate commerce and that to apply these statutes so as to prevent appellants from maintaining a suit on the contract and to instruct the jury that these provisions of the statute constituted a defense would contravene Section 1, paragraph 8, clause 3 of the Constitution of the United States giving Congress power to regulate commerce among the states (R. 91). The court refused this but instructed the jury that if they found that Furst & Thomas, appellants, were the agents of Furst-McNess Company, which was a foreign corporation which had not complied with the laws of Arkansas and had no right to do business in the state and that Brewster acted as agent for Furst & Thomas then their verdict should be for the defendant (R. 86, 88, 93, 94). These instructions were approved by the Supreme Court of Arkansas (R. 98). The sole defense therefore and the only basis for denying appellants' right to recover were these provisions of the statute.

The Supreme Court of Arkansas in its opinion in *Furst & Thomas* v. *Hartzell* which was referred to and adopted in its opinion in this case, (R. 97) stated the same proposition somewhat more succinctly by saying that if the contract sued upon was a contract of agency it was subject to the terms of the "Wingo Act" (Acts 1907, page 744) relating to non-resident corporations. (Now Sections 1826 and 1832 Crawford & Moses Digest) and that as the contract sued on was one of agency it was not a transaction of interstate com-

merce and appellants were within the terms of the statute as agents of a non-qualified foreign corporation and were not entitled to maintain an action or recover because of the provisions of these statutes (R. 105-106). There was no evidence that the Furst-McNess Company had any place of business or was doing business in Arkansas, but as Brewster was held to be their agent this was sufficient in the view of the Supreme Court of Arkansas to bring the corporation within the statute.

The Supreme Court of Arkansas construed these statutes as applying to the agents of a foreign corporation as well as to the foreign corporation itself. As so construed appellants stood in the position of the foreign corporation and if, as the decisions of this court hereafter cited show, the corporation could not be denied the right to sue in the state courts to recover money due on a transaction of interstate commerce because of its non-compliance with such a statute, neither can the appellants be so deprived because of their agency for such a corporation. The appellants and the Furst-McNess Company were both engaged in interstate commerce. The appellants had the same right freely to contract with citizens of Arkansas in interstate commercial transactions and to go into the state courts of Arkansas to enforce said contracts and to collect money due thereon as a foreign corporation engaged in such commerce. Where the statutes of the state are applied as they were in this case to prohibit such right of action to individuals engaged in interstate commerce because they act as agents of a non-qualified foreign corporation, the state statute lays the same unreasonable burden and restriction on interstate commerce as would exist if applied directly to the foreign corporation itself.

The record demonstrates that the only defense raised in the case was the Arkansas statutes heretofore quoted; that they were applied to appellants as agents of a non-resident foreign corporation said to be doing business in the state because Brewster was its agent, so as to prevent appellants from freely coming into the state of Arkansas and maintaining an action in the state courts to recover money due from Brewster on a contract involving transactions in interstate commerce. These transactions were held by the lower court not to be transactions of interstate commerce because Brewster was the agent or consignee of Furst & Thomas, and of the Furst-McNess Company rather than vendee. By reason of the provisions of these statutes a verdict was rendered for the appellee and it was in effect held that the state courts of Arkansas were closed to appellants and that they could not because of these statutes maintain an action upon their contract with Brewster to recover money due on shipments of goods to him in interstate commerce.

c. The right to enforce and collect in the state courts debts arising out of such transactions is a necessary incident of interstate commerce and the imposition of unreasonable conditions upon the exercise of this right unduly burdens interstate commerce and is unconstitutional.

1. This court has frequently so decided and the situation in which the parties were placed by the ruling of the courts below brings this case exactly within those decisions.

Under the instructions of the trial court approved by the Supreme Court of Arkansas it was held that

while Furst & Thomas, appellees, a partnership had a right to do business in Arkansas and to recover from Brewster even though he was their agent, said partnership acting as an agent of Furst-McNess Company, a foreign corporation which had not qualified as such in accordance with the statutes of Arkansas, were within the provisions of the statute and could not maintain an action in the courts of Arkansas and if the jury found that appellees were the agents of Furst-McNess Company, a non-qualified foreign corporation and that Brewster was appellees' agent, then the jury should find for the appellees (R. 87, 88).

The provision of the Arkansas statute particularly relied upon was the following language of Section 1832, Crawford & Moses Digest of the Statutes of Arkansas, defining the penalties which attached to a foreign corporation which had failed to comply with the requirements of Section 1826 quoted above:

> "And as an additional penalty any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid cannot make any contract in this state which can be enforced by it either in law or in equity."

Pursuant to these rulings the court held that the contract between Brewster and appellants could not be enforced in an action at law in the state court of Arkansas. This statute, the validity of which as so applied is here drawn in question, is very similar in its terms to the statutes of other states which have been given a similar effect in similar cases, which this court has always held unconstitutionally interfered with the exclusive power of Congress to regulate interstate commerce. The first case in this court passing direct-

ly upon this question was *International Text-Book Co.* vs *Pigg,* 217 U. S. 91, 54 L. ed. 678. A Kansas statute of similar purport had been held in that case by the Supreme Court of Kansas to prevent the Text-Book Co. from maintaining an action to recover the amount due on a contract made by it with Pigg. The court held that the business of the company was interstate commerce and the contract sued on was a transaction in interstate commerce. The court said of the statute:

> "It imposes a condition upon a corporation of another state seeking to do business in Kansas which in the case of interstate business is a regulation of interstate commerce and directly burdens such commerce. The state cannot thus burden interstate commerce * * *.
>
> "In this connection it is to be observed that by the statute the doors of Kansas courts are closed against the Text-Book Company, unless it first obtains from the secretary of state a certificate showing that the 'statement' mentioned in Section 1283 has been properly made. In other words, although the Text-Book Company may have a valid contract with a citizen of Kansas, one directly arising out of and connected with its interstate business, the statute denies its right to invoke the authority of a Kansas court to enforce its provisions unless it does what we hold it was not, under the Constitution, bound to do; namely, make, deliver, and file with the secretary of state the statement required by Section 1283. * * * It is sufficient to say that the requirement of the statement mentioned in Section 1283 of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and therefore is in violation of its constitutional rights. It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business."

The statute was said to not be "in the way of the enforcement in any state court of competent jurisdiction of the plaintiff's right to a judgment against the defendant for the amount to be conceded due from him to the Text-Book Company under his contract." The ruling and decision of the court in that case are directly applicable to the case at bar.

The same conclusion was reached by the court in a *per curiam* opinion applying the same principles to statutes of Wisconsin and Vermont, respectively, in *International Text-Book Co.* vs. *Peterson* and *International Text-Book Co.* vs. *Lynch*, 218 U. S. 664.

In *Sioux Remedy Co.* vs. *Cope*, 235 U. S. 197, 59 L. Ed. 193, the court had before it a ruling of the Supreme Court of South Dakota affirming the action of the trial court in dismissing an action by a foreign corporation to enforce payment of the purchase price of merchandise sold in interstate commerce, under the provisions of a statute of North Dakota prohibiting foreign corporations from suing or maintaining any action at law or otherwise in any of the courts of the state until it should have filed in the office of the secretary of state an authenticated copy of its charter and providing that no action should be commenced on maintained in any of the courts of this state or any contract, agreement or transaction made or entered into by such corporation until it shall have appointed a resident agent upon whom process may be served and to pay certain fees. The contract involved in that case was almost identical in its terms with that involved here. The contract is printed in the record in that case in this court at page 8. It provides for the sale of goods to Cope but in other parts it is an agency and consignment agreement. The same contention

was made in that case, namely, that Cope was an agent of the foreign corporation and therefore there was no interstate commerce. The Supreme Court of South Dakota correctly held that the transactions were interstate commerce as they involved the interstate transportation of goods whether Cope was an agent or a vendee. The Supreme Court of South Dakota said, and in this respect its decision was affirmed by this court:

> "It matters not whether the contract be one under which a party is to buy goods or sell them or rent them; the sole question is whether or not as a part of the carrying out of such contract it is contemplated that there shall be a shipping from one stage to another of the identical goods to which the contract relates."

The South Dakota court incorrectly held however that their statute applied even if the transactions were transactions in interstate commerce. This court treated the transactions under the contract as sales from the Sioux Remedy Co. to Cope and so described them in its opinion. That is the view that it is submitted should be taken of the transactions in the case at bar.

The court in holding such application of the provisions of the South Dakota statute to be an unconstitutional imposition of unreasonable burdens upon interstate commerce said:

> "Through a long series of decisions dealing with the scope and effect of the commerce clause it has come to be well settled that a state, while possessing power to adopt reasonable measures to promote and protect the health, safety, morals,

and welfare of its people, even though interstate commerce be incidentally or indirectly affected, has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or, by the imposition of conditions, to fetter their right to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection. Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 401, 402, 410, 57 L. ed. 1511, 1542, 1543, 1546, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729 and cases cited; Barrett v. New York, 232 U. S. 14, 31, 58 L. ed. 483, 490, 34 Sup. Ct. Rep. 203, and cases cited.

"The contract and sale out of which the action arose were transactions in interstate commerce, and entirely legitimate notwithstanding the plaintiff's non-compliance with the state statute. (citing cases.) After delivery of the merchandise according to the contract, the plaintiff was lawfully entitled to the purchase price. The defendants were likewise obligated to pay it. And by reason of their refusal the plaintiff had a right of action on the contract. * * * But it * * * is here contended, that while the state could not make non-compliance with the statute a ground for forbidding or invalidating sales in interstate commerce, it could make such non-compliance a ground for preventing the maintenance of any action in the courts of the state, based upon such a sale; in other words, that the state, although unable to condition the right to make the sale or its validity upon a compliance with the statute, could so condition the right to sue for the purchase price in the courts of the state.

* * * * * * * *

"Of the first point it is enough to say that the right to demand and enforce payment for goods

sold in interstate commerce, if not a part of such commerce, is so directly connected with it and is so essential to its existence and continuance that the imposition of unreasonable conditions upon this right must necessarily operate as a restraint or burden upon interstate commerce. * * * We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose. * * * We think the mere statement of the conditions shows that they have no natural or reasonable relation to the right to sue which they are intended to restrict. * * *

"The second one, respecting the appointment of a resident agent upon whim process may be served, is particularly burdensome, * * *. If one state can impose such a condition others can, and in that way corporations engaged in interstate commerce can be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce. As applied to such rights we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause."

The same principle was applied in *Buck Stove & Range Co.* v. *Vickers*, 226 U. S. 205, 57 L. ed. 189; *Wilson-Moline Buggy Co.* v. *Hawkins*, 223 U. S. 713, memorandum opinion reversing the judgment below on the authority of International Text-Book Co. v. Pigg, *supra*.

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.

S. 280, 282, 66 L. ed. 239, a similar statute of the state of Kentucky had been applied so as to prevent the maintenance of a suit in the state courts of Kentucky on a contract for the purchase and interstate transportation of grain. Holding that such application of the statute was unconstitutional and could not prevent the maintenance of such a suit, this court said:

> "A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause. Crutcher v. Kentucky, 141 U. S. 47, 57, 35 L. ed. 649; Teleg. Co. v. Kansas, 216 U. S. 1, 27; International Textbook Co. v. Pigg, 217 U. S. 91, 112, 54 L. ed. 678, 687, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; Sioux Remedy Co v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57.
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> * * * * * * * *
>
> "For these reasons we are of opinion that the transaction was a part of interstate commerce, in which the plaintiff lawfully could engage without any permission from the state of Kentucky, and that the statute in question, which concededly imposed burdensome conditions, was, as to that transaction, invalid because repugnant to the commerce clause."

This settled ruling which has been applied in all of the foregoing cases is directly applicable to this case and renders further citation or discussion of authorities unnecessary. Appellants contract with Brewster and the interstate shipment of goods to him out of which the action arose were transactions in interstate

commerce. The record shows that appellants were entitled to the balance sued for and the appellees were obligated to pay it. Appellants' right to make such a contract and to resort to the state courts of Arkansas, according to the usual mode of procedure there, to collect money due under it, was a necessary incident of interstate commerce upon which unreasonable and burdensome conditions could not constitutionally be imposed by a state statute. These statutes by requiring that the foreign corporation for which appellants were held to be acting as agents must file statements and designate an agent within the state to accept service of process, before it or appellants could make or enforce a contract involving interstate commerce, and that because of non-compliance with the statute, appellants could not enforce in the courts, their contract with Brewster did impose unreasonable and burdensome conditions on a necessary incident of interstate commerce and regulated such commerce in violation of the commerce clause.

For the foregoing reasons the judgment of the court below should be reversed.

Respectfully submitted,

FRANK F. NESBIT,
M. DANAHER,
Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 76.—October Term, 1930.

Frank E. Furst and Fred G. Thomas, Partners, doing business under the firm name of Furst & Thomas, Appellants,
vs.
James G. Brewster, Ed A. Davis, and Henry M. Beaty.
} Appeal from the Supreme Court of the State of Arkansas.

[February 25, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The plaintiffs, copartners, doing business in Freeport, Illinois, brought this suit in the Circuit Court of Bradley County, Arkansas, against James G. Brewster, of Warren, Arkansas, to recover for goods sold and delivered to him pursuant to a contract, the performance of which was alleged to have been guaranteed by the defendants E. A. Davis and H. M. Beaty. By the terms of the contract, the firm of Furst & Thomas agreed to sell and deliver to Brewster, on board cars at Freeport, Illinois, or at their option at their nearest branch warehouse, at their current wholesale prices, their products in reasonable quantities as ordered by him, so long as the contract was in force and his account was in a satisfactory condition. Furst & Thomas agreed to give to Brewster free advice as to the best methods of selling to consumers the goods purchased by him under the contract. Brewster agreed to pay Furst & Thomas the regular wholesale prices, with specified discounts, the payments to be made weekly according to his cash sales and collections. On the termination of the contract, Brewster was to have the privilege of returning to Furst & Thomas his stock of unsold goods. The defendants pleaded that the goods delivered by the plaintiffs to Brewster were manufactured by a corporation, the Furst-McNess Company, organized under the laws of Illinois, with its principal place of business in Freeport, Illinois; that in making the contract, and the deliveries of goods thereunder, Furst

& Thomas acted as the agents of the Furst-McNess Company, and that the Furst-McNess Company had failed to comply with the statute of Arkansas, pertaining to foreign corporations, by filing a copy of its charter and a statement of its assets and liabilities, by designating its general offices in the State of Arkansas, and by designating an agent for the service of process in that State. It was alleged that, in consequence, this suit could not be maintained, as the statutes of Arkansas expressly forbade it.[1]

At the trial the terms of the contract, as above stated, and the transactions under it, were shown. It appeared that Furst & Thomas did business at Freeport, Illinois; that they received at that place orders from the defendant Brewster; and that the goods so ordered were shipped to Brewster at Warren, Arkansas, from the branch warehouse of Furst & Thomas at Memphis, Tennessee. The goods thus shipped had been obtained by Furst & Thomas in Illinois from the Furst-McNess Company, an Illinois corporation doing business at Freeport, Illinois. It was admitted

[1]The statutory provisions thus invoked are found in sections 1826 and 1832 of Crawford & Moses Digest of the Statutes of Arkansas (Acts 1907, p. 744) which provide as follows: "1826. Every company or corporation incorporated under the laws of any other State, Territory, or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served.

"1832. Any foreign corporation which shall fail to comply with the provisions of this act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the County in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered; and as an additional penalty any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid can not make any contract in this State which can be enforced by it either in law or in equity, and the complying with the provisions of this act after the date of any such contract, or after any suit is instituted thereon, shall in no way validate said contract."

that this corporation had not been authorized to do business under the laws of Arkansas. Evidence was also introduced for the purpose of showing that Furst & Thomas were agents of the Furst-McNess Company and to support the contention that the transactions between Furst & Thomas and the defendant Brewster under the contract in suit were those of principal and agent.

The evidence was submitted to the jury upon the question of agency. The Court refused to give the instruction, which the plaintiffs requested, that the statutes of Arkansas (*supra*) had no application, for the reason that, if applied, they would contravene Article 1, section 8, clause 3, of the Constitution of the United States giving to the Congress power to regulate commerce among the States. The jury found in favor of the defendants. A motion to set aside the verdict upon the ground, among others, of error in refusing the request above-mentioned, was denied. The Supreme Court of Arkansas, affirmed the judgment, following its earlier decision in a similar case (*Furst & Thomas* v. *Hartsell*, 172 Ark. 1118), where it was held that the determinative question was whether the relationship between the parties was that of vendor and vendee or principal and agent; that the contract in suit was ambiguous and that it was proper to submit the question of the effect of the contract to a jury for its determination. *Furst & Thomas* v. *Brewster*, 180 Ark. 1167; 21 Southwestern (2d) 863. The plaintiffs bring their appeal to this Court, contending that the statutory provisions in question, as they have been applied by the state court, are repugnant to the commerce clause of the Federal Constitution.

The question is not as to sales made by Brewster in Arkansas, but as to the transactions between Brewster and Furst & Thomas. These transactions were clearly in interstate commerce, whether or not Furst & Thomas were agents of the Furst-McNess Company, and whether or not Brewster was an agent of Furst & Thomas. In pursuance of orders sent by Brewster in Arkansas to Furst & Thomas in Illinois, goods were shipped to Arkansas from the branch warehouse of Furst & Thomas in Tennessee. The ordering and shipment of the goods constituted interstate commerce, and the obligation to pay and the right to recover the amount due, according to the contract pursuant to which the goods were sent, arose in the course of that commerce. In *International Text Book Company*

v. *Pigg*, 217 U. S. 91, 107, this Court quoted with approval the language of the Circuit Court of Appeals for the Eighth Circuit, speaking by Judge Sanborn, in *Butler Bros. Shoe Company* v. *United States Rubber Company*, 156 Fed. 1, 17,[2] a case of consignments to a factor, that "all interstate commerce is not sales of goods. Importation into one State from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce." Such commerce comprehends all the component parts of commercial intercourse between different States, and, according to established principle, any State statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause. *Crutcher* v. *Kentucky*, 141 U. S. 47, 57; *Western Union Telegraph Company* v. *Kansas*, 216 U. S. 1, 27; *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, 290, 291. Accordingly, when a corporation goes into a State other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the State cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose. *Sioux Remedy Company* v. *Cope*, 235 U. S. 197, 204.

In the case last cited, it was recognized that a foreign corporation seeking to enforce such a right in the courts of a State may be required to conform to the prevailing modes of proceeding in those courts and to submit to the usual rules respecting costs, the giving of security therefor, and the like. But the Court, examining the conditions imposed by the State statute, which were similar to those of the provisions here in question, found that they had "no natural or reasonable relation to the right to sue which they are intended to restrict"; that the statutory requirements relating to the appointment of a resident agent upon whom process might be served was particularly burdensome because it required the foreign corporation to subject itself to the jurisdiction of the courts of the State in general, as a prerequisite to suing in any of them even in a single instance. The Court said that in

[2]Certiorari was denied by this Court. 212 U. S. 577.

that way corporations engaged in interstate commerce could "be subjected to great embarrassment and serious hazards in the enforcement of contractual rights directly arising out of and connected with such commerce." See, also, *International Text Book Company* v. *Pigg, supra,* at pp. 112, 114; *Buck Stove Company* v. *Vickers,* 226 U. S. 205, 215, 216; *Dahnke-Walker Milling Company* v. *Bondurant, supra.*

We are of the opinion that the provisions of the statutes of Arkansas, as applied in this case, are in conflict with the commerce clause.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.